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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 16

THE SHOTWELL MANUFACTURING COMPANY (RENAMED HOMAN MFG. CO., INC.), A CORPORATION, BYRON A. CAIN AND HAROLD E. SULLIVAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The order and opinion of the district court denying petitioners' motion to suppress evidence (App. 1754–1771; Pet. 37–54)[1] on the rehearing directed by this

[1] Our record references will correspond to those used in petitioners' brief: The record filed in this Court in 1955, consisting of seven terra-cotta-colored volumes, will be designated "R."; the record on the supplemental hearing ordered by this Court on petitioners' motion to suppress evidence, consisting of three cream-colored volumes printed as the Appellants' Appendix for the court below, will be designated "App."; the one-volume Apellants' Appendix printed for the court below in support of a petition for a writ of mandamus in *Sullivan, et*

Court has not been reported. The order and opinion of the district court denying petitioners' untimely motions challenging the arrays of the grand and petit juries (S. 256–275; Pet. 73–83) is also unreported. The opinion of the court of appeals affirming the judgments of the district court (S. 291–307; Pet. 55–72) is reported at 287 F. 2d 667. The prior opinion of the court of appeals, reversing convictions of petitioners on the ground that the trial court erred in denying their motion to suppress evidence, is reported at 225 F. 2d 394. This Court's opinion vacating the judgment below and remanding the cases for further proceedings is reported at 355 U.S. 23.

JURISDICTION

The judgments of the court of appeals were entered on February 8, 1961 (Pet. 55), and a timely petition for rehearing was denied on April 11, 1961 (Pet. 2). On April 27, 1961, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to June 9, 1961. (Pet. 2.) The petition, filed on that date, was granted on December 18, 1961. (368 U.S. 946.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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al. v. *United States District Court*, C.A. No. 12,140 (which was made a part of the record on appeal in those proceedings by stipulation of the parties (App. 155–158) and which includes the 1960–1961 proceedings in the court below in the case at bar), will be designated "S."; and the two exhibit volumes reprinted for the use of this Court will be designated "Ex. Vol. I" and "Ex. Vol. II."

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

Constitution of the United States:

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner

to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. (1952 ed.) 145(b))

Federal Rules of Criminal Procedure:

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL: DEFENSES AND OBJECTIONS

* * * * *

(b) *The Motion Raising Defenses and Objections.*

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge

an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

* * * * *

QUESTIONS PRESENTED

1. Whether petitioners' pretrial motion to suppress evidence, based on an alleged "voluntary disclosure" of tax derelictions to Treasury officials in reliance upon the Treasury Department's then existing voluntary disclosure policy, should have been granted, notwithstanding the trial court's finding that the alleged disclosure was dishonest, false and fraudulent and was concocted for the express purpose of concealing petitioners' true tax liability.

2. Whether petitioners were entitled to a new trial because of the comment of the trial judge, in his opinion denying suppression of evidence, that it was "entirely probable" that government witness Lubben, in his testimony at the trial in 1953, "may have exaggerated the amounts of the payments that he and his confederates made to Shotwell."

3. Whether there was any falsity or impropriety in the representations which the government made to this Court in support of the Motion to Remand.

4. Whether the trial court erred in denying petitioners' motions, filed nearly four years after the verdicts, challenging the arrays of the grand and petit juries.

5. Whether the court adequately instructed the jury as to the use of the disclosure documents against Sullivan.

STATEMENT

Faced with very damaging evidence of bad faith and adverse findings on that issue, petitioners have devoted a major part of their brief to attacking the integrity of the trial court, the conduct of government counsel, and the credibility of the government's witnesses. In addition, they charge that the government abused the processes of this Court by inducing it, falsely and improperly, to remand the case, almost five years ago, for supplemental proceedings. These accusations, which were considered and rejected by the courts below, are wholly unwarranted. To avoid further complication of a necessarily lengthy Statement, we shall not endeavor to include the evidence which bears on petitioners' charges of impropriety. The evidence on that subject is discussed in Point III of the Argument, *infra*, pp. 83–90. Similarly, we shall postpone our summary of the evidence relating to the issue of jury selection. See Point IV, *infra*, pp. 103–104, 107–109, 111–112, 114.

1. Procedural history

In 1952, Shotwell Manufacturing Company, the corporate petitioner, and the individual petitioners (together with Frank J. Huebner), as corporate officers, were indicted for willful attempted evasion of a large part of the corporation's income tax for the years 1945 and 1946. (R. 4–7.) The unreported income consisted of some $500,000 in cash premium payments received by the corporation on the sale of

candy at prices in excess of the recorded invoice and O.P.A. ceiling prices, and of payments received for wholly unrecorded sales. (R. 8–9.)

Petitioners filed a pre-trial motion to suppress evidence, alleging that in reliance upon a promise of immunity under the Treasury Department's then existing voluntary disclosure policy, they had made a valid and timely disclosure to a Treasury official of the tax derelictions for which they were later indicted (R. 120–127, 144–145.) The motion also alleged, and petitioners sought to show (R. 131, 150–151, 174–175, 204–207, 215–217, 248, 254, 285, 2579), that the corporation's unreported receipts were offset by unreported (unclaimed) over-ceiling cash premium payments for goods purchased, and that petitioners had therefore not earned a profit from the transactions. After a pre-trial hearing on the motion in 1952 (R. 150–448), the trial court [Judge Nordbye, sitting by special designation] denied the motion to suppress on the ground that no good-faith disclosure had ever been made. (R. 447–448, 3242–3247.)

After a five-week jury trial in 1953, petitioners and Huebner were found guilty as charged. (R. 2990.) The corporation was fined $10,000 on each count. The individual petitioners and Huebner were sentenced to imprisonment for concurrent terms of three years on each count and were fined varying amounts. (R. 3012, 3015–3016, 3018–3019, 3075, 3221–3224, 3256–3257.

In 1955, the court of appeals (one judge dissenting) reversed the convictions, on the ground that the pre-trial motion to suppress should have been granted,

and remanded the case for a new trial with instructions to sustain the motion. In the opinion of the majority (225 F. 2d at 403), petitioners "did disclose the facts" and their disclosure was timely because it was made before any investigation was initiated. The United States petitioned for a writ of certiorari.

After the petition had been filed, the Internal Revenue Service advised the Department of Justice that an investigation then in progress indicated that perjured testimony relevant to the suppression issue had been given at the pre-trial hearing on the motion and again at the trial. The Solicitor General immediately advised this Court of the receipt of this information and thereafter filed a motion to remand the case to the district court for the taking of further evidence on the suppression issue. The motion to remand, as amended and supplemented, alleged that the newly discovered evidence clearly indicated that the court of appeals' decision sustaining the motion to suppress was based on a perjurious record attributable to the fraud of petitioners.

This Court (355 U.S. 233) granted the petition, vacated the judgment of the court of appeals and remanded the case to the district court. Its instructions were to hold a further hearing on the suppression issue, to make such new findings on this issue as might be appropriate in light of the further evidence and the entire existing record, and either to enter new final judgments or to grant a new trial.

A three-week supplemental hearing on the suppression issue was held by the district court in December,

1958. On April 15, 1959, the district court entered an order in which it set forth new findings of fact and conclusions of law and again denied the motion to suppress evidence on the ground that no bona fide disclosure had been made. (App. 1754–1771; Pet. 37–54.) On May 22, 1959, the district court entered new judgments of conviction which, with respect to petitioners, were identical to those entered originally in 1953.[2] (App. 1797–1811.) The court of appeals affirmed the convictions, holding, *inter alia*, that petitioners' motion to suppress evidence was properly denied. (S. 291–307; Pet. 55, 60.)

2. The motion to suppress evidence

As previously noted, petitioners' pre-trial motion to suppress (R. 120–127, 144–145) was predicated on the contention that they had made a timely "voluntary disclosure" to the Treasury Department, in reliance upon the then existing and publicly announced policy of that Department not to recommend prosecution of any taxpayer who made such a disclosure; and that, accordingly, they were entitled to the suppression of all evidence obtained from them subsequent to the disclosure.

(a) The voluntary disclosure policy

The so-called "voluntary disclosure policy" of the Treasury Department, publicly announced in 1945

[2] Huebner, who withdrew his plea of not guilty, entered a plea of guilty (App. 1800–1801), and testified as a government witness at the further hearing on the suppression issue (App. 561), was sentenced to three years imprisonment, execution of which was suspended, and was fined $5,000 (App. 1804, 1807–1808).

and effective until its withdrawal in January, 1952, was an administrative policy which was not formalized in rule or regulation. (R. 3125–3126, 3142.) The substance of it was that in cases in which taxpayers voluntarily disclosed their intentional evasions before an investigation had commenced, the Treasury Department would not refer the case to the Department of Justice for criminal prosecution but would merely assess the tax deficiency plus civil penalties, including the 50 percent penalty for fraud. (R. 3136–3137.) The two most authoritative pronouncements by Treasury Department officials declared that a voluntary disclosure occurs when a taxpayer discloses fraud upon the government (R. 3135–3136), and that the policy "presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability." (R. 3141.) These two statements—one by J. P. Wenchel, Chief Counsel of the Bureau of Internal Revenue, and the other by Secretary of the Treasury Snyder—were issued in May, 1947.[3]

[3] The text of intra-departmental memoranda on the disclosure policy, the text of public statements by Treasury officials on the subject, and testimony given before a Congressional Committee on the subject, after the policy had been revoked, appear in the record. (R. 3103–3153.) Relevant excerpts are set forth in the Appendix, *infra*.

The reasoning behind the policy was described by Mr. Wenchel as follows (R. 3137):

"In excising the man from criminal prosecution, we are merely taking a sensible step to produce the revenue called for by law with the minimum cost of investigation. The man who makes a voluntary disclosure saves us a lot of money in investigating. In return, we can spare him a term in jail. This is good business from his standpoint and it is good business from the Government's standpoint."

(b) The allegations of the motion

Petitioners' motion to suppress evidence (R. 120–127), as amended (R. 144–145), alleged that in January, 1948, relying upon the voluntary disclosure policy, they had made a timely disclosure to a Treasury official that certain black market income, together with fully offsetting deductions for black market purchases, had been intentionally omitted from the corporation's 1945 and 1946 income tax returns. The motion also alleged that after Treasury officials had acknowledged the sufficiency and timeliness of the disclosure, petitioners had made available to Treasury agents the books and records of the corporation, had communicated additional information material to the "omissions and misstatements" in the corporate returns, and had otherwise cooperated with the examining agents to the utmost of their ability. (R. 122–123.)

The motion stated that, at the time the alleged disclosure was made, it was the legal position of the Treasury Department—with which petitioners did not agree (R. 17, 31)—that expenditures for materials in excess of O.P.A. ceiling prices could not be included in the cost of goods sold for the purpose of determining taxable income,[4] and that the corporation therefore owed additional taxes for the years in question.

[4] This question was then pending before the courts. In December 1948, the Tax Court overruled the Commissioner and held such deductions allowable (*Sullenger* v. *Commissioner*, 11 T.C. 1076), and this was followed by a number of decisions to the same effect in the courts of appeals. (R. 144–145, 427–428.) The Commissioner acquiesced in these decisions prior to the hearing on the motion to suppress (see, 1952-2 Cum. Bull. 71).

It further stated that the corporation stood "ready, able and willing to pay such unpaid tax, interest and civil penalties, if any, as might be determined to be due." (R. 144–145.)

The motion prayed for the suppression of all evidence obtained from petitioners subsequent to the alleged disclosure on the grounds that its use would violate the petitioners' rights under the Fourth and Fifth Amendments to the Constitution. (R. 123.)

(c) The original hearing on the motion

In November 1952, a three-day hearing on the motion was held before Judge Nordbye, at which eleven witnesses testified. (R. 150–448.) The principal witnesses for petitioners were Leon J. Busby, Shotwell's accountant since 1942 (R. 168–220, 397–399), and Cain, the corporation's president, (R. 220–259, 339–404.)

Busby testified, in substance, as follows: During the years 1944, 1945 and 1946, the Shotwell Company received substantial cash payments from one David G. Lubben for black market candy sales above O.P.A. ceiling prices. These receipts were neither recorded on the corporation's books nor reported in its income tax returns. Busby first learned of these black market transactions in the course of conversations with H. Stanley Graflund, the corporation's comptroller, during a trip to New York early in January 1948. Immediately upon his return to Chicago, he discussed the matter with Cain and Sullivan (Shotwell's executive vice-president), who told him that all the black market receipts had been used by the corporation for the

purchase of raw materials; that, since they did not wish to reveal violations of O.P.A. regulations, they had kept no records of either the receipts or the expenditures; and that they had not reported the receipts as income because they considered the expenditures for black market purchases deductible and the whole series of transactions a "wash out" for tax purposes. Busby advised Cain and Sullivan that they had a tax problem, as the Commissioner of Internal Revenue would not allow taxpayers to include in cost of goods sold payments in excess of ceiling prices for the purchase of materials. He recommended that they disclose the omissions to the taxing authorities and, according to him, the alleged disclosure was made shortly thereafter. (R. 169–172, 204–207, 209–211, 213–215.)

Busby testified further that, pursuant to instructions from Cain and Sullivan, he revealed the above facts to Chief Deputy Collector Sauber in a series of conferences in January 1948, at one of which he was accompanied by Cain. According to Busby, Sauber said that the disclosure was sufficient and timely; that the Internal Revenue Service would not allow deductions for purchases of raw materials at prices above the O.P.A. ceiling; that the black market transactions should be reconstructed as accurately as possible and a summary of the transactions prepared; and that an agent would be sent out to verify the results and audit the corporate returns. Busby stated that, having received Sauber's assurance that only a civil liability was involved, he [Busby] and his staff, with the assistance of Cain, Huebner and

Graflund, conducted an exhaustive investigation over a period of several months in an effort to reconstruct the amounts involved in the corporation's black market transactions; and that the results of this investigation were summarized in the schedule which he submitted to Revenue Agent Lima (see, Deft. Exs. 1 and 13, suppression hearing, reproduced in the record at p. 3171)[5] when the latter appeared at the corporation's plant in August 1948. (R. 175–189, 198–199, 207–216.) Busby's summary indicated that the corporation's unreported receipts from Lubben, for the years 1944, 1945 and 1946, totaled some $378,000; and its unreported (unclaimed) deductions for black market purchases during the same period totaled some $372,000. The difference—approximately $6,000—was reported as income in the corporation's 1946 return. (R. 131.) There was no indication in the disclosure that a substantial part of the amounts allegedly expended for inventory were in fact appropriated as constructive dividends by Shotwell executive stockholders, including the individual defendants, but unreported as income by them. (App. 1758–1759.)

Cain, whose testimony paralleled Busby's in the above respects, stated that he met with Sauber in January 1948; that he left Chicago for California on January 23 or 24, 1948; that he returned to Chicago from California on March 3, 1948, saw Sauber on March 4, 1948, and went back to California on

[5] As originally identified by Busby, the schedule was one of several sheets admitted as Deft. Ex. 1. (See R. 3096.) The document was also admitted at the trial as Govt. Ex. 186. (Ex. Vol. I, p. 117.)

March 11, 1948; and that he returned to Chicago in the latter part of April 1948, leaving California by automobile about April 21 or 22, 1948. (R. 221–222, 230–232, 250, 252, 399–404.)[6] Apprised by Sauber that over-ceiling expenditures for raw materials would not be allowed the corporation as deductions, Cain claimed to have told Sauber that he was prepared to pay the tax but that Shotwell would probably try to obtain a refund of that portion which was attributable to disallowance of the over-ceiling disbursements. (R. 232, 252–255; Pet. Br. 17, 23.)

With respect to the unreported receipts, Cain testified that the figure of $378,000 reflected in Busby's summary as the total of (R. 260) the "over ceiling payments to The Shotwell Manufacturing Company" was overstated (to an unspecified extent) because it resulted from applying to every invoice sent to Lubben "the maximum over ceiling price" (R. 232), even though on some invoices Shotwell received no over ceiling premium (R. 233). Questioned about the alleged offsetting expenditures for black market purchases, Cain responded that he did not know to whom the money was paid (R. 241, 244, 266); that he "never handled a penny" of the black market receipts (R. 262); and that no one connected with Shotwell could recall the (R. 249) "faceless people" to whom the payments for raw materials were made. (R. 223–224, 244, 256, 258–269, 273–274.) Cain conceded that the figures appearing on Deft. Ex. 1 as expenditures

[6] Cain also testified at the trial that in April, May and June 1948 he importuned Sauber to have an audit made and the tax matter settled. (R. 2561–2562.)

for the purchase of raw materials—which figures purported to show that the unreported receipts were washed out by unreported deductions—were meaningless "plug" figures which he compiled in (R. 233) "less than a minute." As he put it (R. 233): "I knew they weren't any good, and we couldn't substantiate them, but I threw them in for what they were worth. I hoped * * * [the government would believe] that we paid out something." (R. 258–269, 273–274.)[7] In short, it was Cain's testimony that, although they could not substantiate the alleged expenditures, he was certain that, with the exception of the aforementioned $6,000, all the unreported receipts had been expended by the corporation for the purchase of raw materials. (R. 248, 254–255, 263–264, 266.) Moreover, he agreed to give the investigating agents all the help they needed. (R. 401.)

Sauber, who was called as a government witness (R. 281–306), corroborated the testimony of Busby and Cain in all except two material respects. Sauber fixed Busby's first visit to him at about the middle of March 1948 and Cain's within a week thereafter (R. 282–284); and he denied having told Busby and Cain that their revelations constituted a timely and sufficient voluntary disclosure (R. 291). Sauber testified that, about 30 days after the initial visit in March 1948, Cain informed him that there had been a meet-

[7] Revenue Agent Lima testified that when he arrived at the Shotwell plant in August 1948 to begin an audit, Busby presented the summary of black market receipts and expenditures with the comment that the summary represented the unreported receipts and disbursements (R. 321) "as near as they could figure."

ing of all the Shotwell people who were connected with the black market transactions; that they had prepared figures relative to the over-ceiling purchases and sales; and that Cain wanted to turn the figures over to him.[8] Sauber also confirmed Cain's testimony that the latter thereafter importuned him repeatedly to obtain an immediate audit of the Shotwell returns. (R. 285–289, 301–304.)

At the conclusion of the hearing, the court denied the motion to suppress, observing that it would be inappropriate to express its views prior to trial on the credibility of the witnesses and the good faith of petitioners. Accordingly, the court reserved the right, in the event petitioners were found guilty, to file findings of fact and conclusions of law on the motion upon completion of the trial.[9] (R. 447–448.)

After the verdict, the trial court filed a Memorandum Decision (R. 3242–3247), setting forth its findings of fact and conclusions of law on the motion, and holding that (R. 3247) the petitioners "failed to sustain the burden of proof in establishing that a voluntary disclosure was made by them within the purview of the so-called voluntary disclosure doctrine." The court found, among other facts, that contrary to representations made by petitioners to Treasury officials (R. 3246–3247) "large sums of black

[8] As we will show (*infra*, p. 35–36), this conversation with Cain could not have occurred as Sauber testified, for it was not until July 1948 that the meeting was held and the figures prepared.

[9] In this connection the court stated (R. 448): "If Counsel desire that I should file a memorandum forthwith, I have no objection, of course, to doing so * * *." No such request was made of the court.

market receipts received by the Shotwell Company were never paid out for raw materials on the black market or elsewhere during 1945 and 1946," and that by their "false statements and fraudulent representations" to government agents in the guise of a voluntary disclosure, petitioners had actually attempted to deceive the government and to conceal the true facts. In view of this determination, the trial court deemed it unnecessary (R. 3247) "to make any finding as to the exact date when the Government first commenced its investigation of the Shotwell Company's income taxes for the years in question"—that is, on the issue of timeliness.

3. The trial

David Lubben, the Government's principal witness at the trial on the merits, testified that in August or September 1944, he arranged with Huebner[10] to pay a cash premium of ten cents a pound above the O.P.A. ceiling price at which the candy was invoiced (R. 796–797), and that the overceiling transactions commenced in November or December 1944 (R. 798–801). Lubben personally made the following over-invoice

[10] Huebner, a long-time employee of the corporation, was a vice-president and plant manager. He owned less than one per cent of the stock. Sullivan was general counsel, a director, and, beginning in 1946, executive vice-president. In 1945, Cain and Sullivan and their families owned about 48 per cent of the corporation's stock, which holdings were increased in 1946 to about 75 per cent. (R. 748, 1707, 1772, 1793, 2542, 2648; Pet. Br. 6.)

cash payments to Huebner from January 1945 to November 1946:

1-19-45	$10,819.00	(R. 814-819, 1427-1430, 1434, 1441-1452, 1457)[1]
2-7-45	6,183.00	(R. 820-823, 1435-1442)
3-6-45	18,000.00	(R. 823-828, 1453-1490)
3-28-45	15,000.00	(R. 828-831, 1453-1490)
5-3-45	22,124.13	(R. 831-837, 1453-1490)
5-3-45	2,403.00	(R. 831-837, 1492-1498)
5-9-45	6,459.75	(R. 837-841, 1498-1502)
5-25-45	4,455.00	(R. 841-842, 1502-1508)
5-25-45	20,000.00	(R. 842-847, 1508-1516, 1524-1527)
6-28-45	5,524.00	(R. 847-849, 1508-1516, 1524-1527)
9-?-45	30,000.00	(R. 849-855, 1527-1534)
11-27-45	36,148.35	(R. 849-855, 1527-1534)
3-25-46	1,488.00	(R. 888-890, 1542-1554)
3-29-46	35,536.00	(R. 864-876, 1538-1542)
4-?-46	14,000.00	(R. 889-890, 1542-1554)
10-7-46	12,235.00	(R. 892-898, 1555-1565)
11-7-46	319.50	(R. 898-901, 1565-1568)
11-7-46	2,004.00	(R. 901-905, 1565-1568)
10-12-46	35,929.81	(R. 910-920, 1573-1577)
11-8-46	13,146.70	(R. 922-933, 1573-1577)

Similar cash payments were made to Huebner by Lubben's employees, Heitman and Hankermyer (R. 876–892, 1369–1376, 1554), and by his brother-in-law, Moran, who made the final payment in December 1946 (R. 1289–1313.) In one instance, Cain had Lubben pay $1,450 of the overages due the corporation to a Mrs. Krasne in connection with the purchase of jewelry by Cain's wife. (R. 891, 1286–1288, 2628–2629.) The totals of these overceiling cash receipts were (R. 1838–1840, 1845–1846, 2064–2066):

1945	$177,146.23
1946	211,193.19

[1] The first reference indicates the testimony of Lubben; the second indicates the testimony of his bookkeeper, Miss Feldman, who traced the transactions through Lubben's books and records. Most of the above testimony of Lubben was admitted only against Huebner and the corporation. The testimony of Miss Feldman was admitted against all the defendants.

In addition to the above transactions—in which the invoice price was always paid by check and only the overage in cash—the corporation made a number of "unbilled shipments" to Lubben during 1946, for which no invoice was made out and for which Lubben paid both the ceiling price and the overage in cash. (R. 802–805, 933–962.) The "unbilled shipments" by the corporation to Lubben during 1946 totaled $65,532.98. (R. 1845–1846.) All told, the unreported receipts from Lubben during the years 1945 and 1946 were $177,146.23 and $276,726.17, respectively—or a total for the two years of $453,872.40. (R. 1838–1840, 1844–1846, 2064–2066.)

Lubben's direct testimony regarding payments to Shotwell was corroborated, in large part, by documentary evidence. Lubben made and retained some record of many of the cash payments to the corporation, and both Lubben and his bookkeeper, Miss Feldman, keyed the various payments into Lubben's records by identifying the pertinent invoices, book entries of invoice plus overage, "recap sheets," "cash authorizations sheets," and checks to cash. (R. 811–962, 1405–1578, passim.) Although in many instances the complete set of documents covering a particular payment was not available at the time of the trial, Lubben's testimony as to most of the payments was supported by one or more of the above records, and in one instance, by an informal "recap sheet" prepared by Huebner (Govt. Ex. 63–B, Ex. Vol. I, p. 55) and left in Lubben's hands at the time of payment. Lubben's testimony was also corroborated (i) by Cain's testimony on the motion to suppress, which was read into the

record at the the trial (R. 1941–1951), to the effect that the Shotwell people made a compilation which resulted in (R. 1944) "a figure of something like $400,000.00" for the overceiling receipts from Lubben (R. 1943–1944), and (ii) by the so-called disclosure recapitulations introduced at the trial (Govt. Exs. 186, 189 A–E), which reflected a computation of black market receipts in 1944, 1945 and 1946 totaling $378,000.[12]

Shotwell's comptrollers, Howard Roeser and Graflund, and Mrs. Morrill, a bookkeeper, testified at the trial that certain cash payments were received by the corporation from Lubben beginning in the latter part of 1945, that this money was placed in a "corn box" in the company vault, was sometimes shifted to a safety deposit box in a bank, and was expended to procure corn in the black market. Although Roeser and later Mrs. Morrill kept a memorandum record of the amounts deposited in and disbursed from the "corn box," that record, as noted *infra*, p. 40, was destroyed before the trial, on Cain's instructions. Graflund estimated that the cash receipts from Lubben of which he was aware totaled $80,000, while Mrs. Morrill's estimate of receipts within her knowledge was $50,000 or $60,000. The "corn box" was closed around July or August 1946. (R. 778–782, 784–785,

[12] It is noted in this connection that Busby testified at the original suppression hearing that after the summary schedule had been prepared—with the aid of Cain, Sullivan and Huebner—it was checked against (R. 188) "some papers that Lubben had sent in [to the corporation] covering these overceiling items and we were able to compare Lubben's figures with the independent computation that we had made. * * * In many instances the figures were identical and it made us feel that our computations were correct."

1701–1709, 1717–1722, 1730–1737, 1740–1742, 1745–1756, 1780–1789.)

Three Shotwell employees—Roeser, Graflund and Hogan—testified they had made payments, apparently for black market corn or corn syrup, to a Dr. Doe and to a man named Keeley (R. 1732, 1736, 1738, 1782–1785, 2009–2014, 2017), but none of the three could testify to the payment of any specific amount. No witness was called by petitioners to testify that he had received any currency payments from Shotwell for the procurement of corn or any other raw materials in the black market.

In defending on the merits, Cain maintained that the total of the unreported cash receipts from Lubben was much smaller than the $378,000 shown on Busby's summary and indeed was less than a third of $400,000 (R. 2624); that the cash premium payments were received only during the period from about September 1945 to July 1946 (R. 2572, 2626–2627); that "every dime" so received had been expended by the corporation for the purchase of raw materials on the black market (R. 2577–2579); and that for the most part this money was paid out to (R. 2580) "nameless and faceless people." As noted above (see p. 14, *supra*), Busby's summary showed that the corporation's unreported receipts from Lubben were offset (except for about $6,000) by unreported (unclaimed) deductions totalling $372,000 for black market purchases of chocolate, milk, corn syrup, cocoa beans, cocoa bean deal, sugar deal, and "sales expenses and unallocated." The figures for these disbursements were prepared by Cain (Govt. Ex. 185, Ex. Vol. I, p. 116), who gave

them to Busby with instructions to make them add up to and offset the unreported receipts. On cross-examination Cain admitted the offsetting disbursement figures were largely fictitious. (R. 2585–2601.)

Both Cain and Sullivan denied from the witness stand that they personally had received any of the cash paid by Lubben. (R. 2579, 2638, 2654, 2671). As Sullivan put it (R. 2671): "I never saw any of the money, never got any of it myself." According to Cain and Sullivan, the details of the black market transactions were left entirely to subordinates. (R. 2576–2584, 2624, 2650–2654, 2670–2673, 2685.) Huebner, to whom almost all of Lubben's payments were made and who was in charge of the operation of the Shotwell plant, did not take the stand at the trial (although he became a principal witness at the subsequent supplemental hearing).

Cain and Busby testified that the work of compiling data with respect to the corporation's black market transactions was done over a period commencing in January and ending in June 1948. (R. 2577, 2585–2586, 2590, 2837; Pet. Br. 18–19.) Busby further testified that the compilation (Govt. Exs. 189A–189E, Ex. Vol. I, p. 122–126) was prepared from records made available primarily by Gratlund and from hearsay information supplied by Shotwell employees. (R. 2815–2816.)

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[12] In Cain's affidavit of September 22, 1952, in support of the motion to suppress evidence, he also alleged (R. 131) that, immediately following a voluntary disclosure to Sauber in January 1948, petitioners commenced the preparation and compilation of figures with respect to the omissions and misstatements in the corporate returns. Actually, as will be shown (*infra*, pp. 35–36), no work was done on such a compilation until July 1948.

4. Rejection by Judge Nordbye, following the additional hearing ordered by this Court, of petitioners' contentions bearing upon the alleged voluntary disclosure

The supplemental hearing ordered by this Court on the suppression issue commenced before Judge Nordbye on December 1, 1958 (App. 526), and, exclusive of preliminary matters and motions (App. 1–525), consumed three weeks. In all, thirteen witnesses testified at the hearing, four called by the government[14] and nine by petitioners. The testimony of Busby, Sauber and Revenue Agent Johnson was not available to the government, since they, together with Cain and Sullivan, were under indictment for conspiracy to commit various offenses against the United States in connection with this case.[15] The government's principal witness was Huebner, one of the defendants in the case, who, as we have already noted, was plant manager for Shotwell and one of the principal parties to the transactions in question. Cain testified in his own behalf,[16] but Sullivan did not take the stand. On April 15, 1959, the court entered its order denying the motion to suppress.

Judge Nordbye's findings of fact and conclusions of law, pursuant to the Court's mandate (355 U.S. 245), were based upon "the entire existing record"—including the record of the original suppression hearing

[14] Huebner, one of the defendants below (App. 501–984); Grallund (App. 1020–1341, recalled by appellants, App 1545–1548); Revenue Agent Lima (App. 1514–1544); and E. C. Wright, at all times material Internal Revenue Agent in Charge at Chicago. (App. 991–1020.)

[15] See S 1–28.

[16] Cain was asked only seven questions on direct examination, all of them on rather tangential matters. (App. 1607–1608.)

and the record of the trial itself, insofar as relevant to the suppression issue. Judge Nordbye found, among other things, the following:

That, although Graflund probably did inform Busby of the over-ceiling transactions in January 1948, and although Busby, and perhaps also Cain, probably visited Sauber sometime prior to June 21, 1948 (App. 1761), nonetheless, March 15, 1948, was merely "an arbitrary date which was agreed upon by Cain, Busby, and Sauber" as the date Sauber would testify Busby first visited him; that "obviously it was much later" when Sauber was informed that Shotwell was the offending taxpayer (App. 1764–1765) (contrary to the testimony of Cain and Busby that they had made a disclosure to Sauber in January 1948).

That Busby and the Shotwell employees did not work on figures for a voluntary disclosure from January to June 1948; that petitioners made no attempt to turn over to the government any computations of black-market receipts and expenditures until after Special Agent Krane's visit of June 21, 1948; that Cain's plans were to effect an early settlement of Shotwell's taxes before any government agents pried into the company's books and records; and that petitioners made no concerted effort to prepare the black market computations until July 1948. (App. 1760–1762.)

That substantial sums of black market money, totaling between three and four hundred thousand dollars, were "paid to Shotwell as premium payments by Lubben during 1944, 1945 and 1946". (App. 1758.)

That "the greater part of this so-called black market money was appropriated by Cain, Huebner and Sullivan for their own personal use" (App. 1758–1759); and that "only a relatively small percentage of the black-market payments made by Lubben to Shotwell were utilized for the purchase of raw corn" (App. 1763).

That the alleged offsetting black market payments made by Shotwell to wash out the black market receipts were, as represented to the Supreme Court by the affidavits of Huebner and Gratlund, concocted "out of thin air" by Cain (App. 1762).

That "in representing to the Government that all of the premium payments [made] to Shotwell were expended for raw materials," the petitioners "made a dishonest, false and fraudulent disclosure * * * concocted for the express purpose of misleading the tax officials" (App. 1766).

That petitioners "never did disclose the true facts to the Treasury Department in that they failed to reveal that substantial amounts of the unreported income were diverted into the pockets of the officials of the company and falsely contended that substantially all of the black market receipts were expended for overceiling purchases of raw materials". (App. 1767.) In so finding the court noted that this also was necessarily "the jury's conclusion on the record at the trial in that the jury was expressly instructed that, if the over-ceiling payments received by Shotwell were expended for raw materials * * * then its verdict must be one of not guilty" (*ibid*).

That Cain obtained $10,000 from Huebner in the summer of 1948 in order to "fix" Shotwell's tax case; that Cain told Huebner in the summer of 1948 he had been able to settle Shotwell's tax difficulties for a $20,000 deficiency, a plan which later went awry; and that agent Lima took preliminary steps to prepare a report for the settlement of Shotwell's tax deficiency in the amount of $20,000. (App. 1767–1768.)

That "fraud permeated the showing made by these * * * [petitioners] before me at the original suppression hearing, as well as at the trial and the supplemental hearing"; and, that "no honest, bona fide voluntary disclosure to any government official ever was made by Shotwell or these * * * [petitioners] with respect to Shotwell's 1945 and 1946 taxes." (App. 1770–1771.)

The court concluded, as a matter of law, that "dishonest and false disclosure cannot be held to be a timely voluntary disclosure" within the purview of the voluntary disclosure policy in existence at the time. (App. 1771.)

5. The evidence that there was no voluntary disclosure, but that there was, instead, a conspiracy to defraud the United States and to perpetrate a fraud upon the courts

Petitioners do not, in terms, challenge the sufficiency of the evidence to support the findings and conclusions below. They do, however, subject Judge Nordbye's order to indirect attack, attempting, throughout their brief, to cast a shadow both upon the findings themselves and upon the credibility of all adverse witnesses. To bring into sharper focus the central facts of this case, we shall undertake at this

point to summarize the evidence which sustains the findings and conclusions of the district court, affirmed without exception by the court of appeals. Viewed, as is proper, in the light most favorable to the government, that evidence is as follows:

(a) Evidence that the black market receipts were not offset by disbursements, as petitioners claimed, but, instead, had "stuck to [petitioners'] fingers"

At the supplemental hearing, Huebner testified that during the period of November 1944 to December 1946 (not merely September 1945–July 1946, as petitioners alleged), the Shotwell company received currency from Lubben for merchandise sold to him or his companies. The cash paid over by Lubben represented (i) premium payments in excess of the O.P.A. ceiling prices at which the merchandise was invoiced and (ii) payments for "unbilled shipments." Seventeen such payments were received by Huebner himself from Lubben or his agents, and other payments were received by Graflund, Roeser and Mrs. Morrill. The seventeen payments totaled approximately $300,000,[17] no part of which was expended by the corporation for the purchase of raw materials on the black market or elsewhere. Instead, Huebner turned the money over to Cain and Sullivan, except for $9,000 which he (App. 602, 629) retained for himself. In addition to the $9,000, Huebner received back from Cain $36,000. In all, therefore, Huebner received $45,000 of the Lubben money for his own

[17] The amount received in each of the years in question was as follows: 1944, $28,000 (App. 582-584); 1945, $101,000 (App. 586, 590-591, 598, 601-603); 1946, $171,000 (App. 618-619, 621-622, 624-632, 635-641).

use. The balance, roughly $250,000, went into the pockets of Cain and Sullivan. (App. 582–642, 1039–1042, 1323–1324, 1336–1339.)

Raw corn was the only commodity purchased by Shotwell on the black market. (App. 682, 1065–1067.) The black market corn "deals," all of which were arranged by Huebner, involved only three payees and, according to Huebner, were confined to the first six months of 1946, when there was a corn shortage. With two exceptions, the funds used for this purpose were the cash payments from Lubben which were received by Roeser, Graflund and Mrs. Morrill.[18] (App. 605–617, 872–873.) According to Graflund, the total amount paid out by the corporation for black market corn was estimated by Shotwell's officers at about $125,000. (App. 1065–1067.)

(b) Special Agent Krane's visit to the plant, and the aftermath thereof

The preceding evidence pertains to the period 1945–1946 and sustains the ultimate finding that petitioners' disclosures to the government were false in content. The evidence which will be summarized in the remainder of this Statement relates to the period commencing in June 1948 with Special Agent Krane's visit to the Shotwell plant. It is directly relevant to the question whether petitioners, throughout their dealings with Treasury officials, were committed to plans of concealment and fraud, rather than honest disclosure. Most of the testimony to which we refer was

[18] The two exceptions were some $14,000 withdrawn from the corporation's bank account and $2,000 received from Standard Glue Company for an unbilled shipment. (App. 609–617.)

given by Huebner, Graflund, and Lima at the supplemental hearing; the balance by Lubben and Samuel Davidson [Lubben's attorney] at the trial.[19]

On June 21, 1948, Special Agent Krane, Internal Revenue Service, went to the Shotwell offices in Chicago and asked Graflund, the Shotwell comptroller, for records relating to transactions with Lubben and Lubben's companies. Cain, Sullivan and Huebner on that day were attending a candy convention in New York City. In Krane's presence, Graflund called Cain and advised him of the request for records. Later in the day, Cain called Graflund to learn what information Graflund had given Krane and why he had done so. Sullivan also spoke with Graflund and asked why he had not demanded a subpoena. Both Cain and Sullivan seemed greatly disturbed and Cain seemed angry. (App. 1046–1047, 1232–1233.) On the same day, Cain told Huebner that he had received a telephone call from Graflund, that an Internal Revenue Agent was in the office at Chicago, that Graflund, "like a darned fool," had given the agent papers concerning Lubben's company and Shotwell, and that Cain and Sullivan had raised "particular hell" with Graflund for giving up the records. (App. 650–651.)

[19] Where the identity of the witness who gave the testimony summarized in the text is not otherwise apparent, it can be ascertained from the page reference. Huebner's testimony is at App. 561–983; Graflund's, at App. 1020–1344 (and his trial testimony at R. 1739–1798); Lima's, at App. 1344–1545 (original suppression hearing and trial testimony at R. 319–326, 2804–2807); Lubben's, at R. 787–1285; and Davidson's at R. 1313–1367.

On the same day (June 21, 1948), Cain, Sullivan and Huebner met with Pat Grace, a New York attorney. Cain told Grace that they were in trouble with Internal Revenue, that they had received black-market money from Lubben, and that some of it had "stuck to our fingers." Grace said that he had friends in Internal Revenue in New York and that he would find out what was going on. There was no mention of a voluntary disclosure at this meeting with Grace. (App. 651–653.)

The next day (June 22, 1948) Cain, Sullivan and Huebner met in New York with a Daniel Tobias, who said he had worked for Lubben, was then working for Internal Revenue, and could provide information as to what was transpiring in the New York Internal Revenue office with respect to Shotwell and Lubben.[20] Tobias wanted to be paid, and Cain promised to take care of him. (App. 654–656.)

Also on June 22, 1948, Cain, Sullivan and Huebner met with Ed Sproull, an accountant who retained some of Lubben's records. Cain arranged for Sproull to prepare a record of Lubben's transactions with Shotwell and to send it to Sullivan. Sullivan received records from Sproull shortly thereafter.[21] (App. 656–659.)

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[20] About a week before June 21, 1948, Tobias called Graflund from New York, said he had information concerning an investigation to be conducted of Shotwell, and wanted to talk with Cain. Graflund told this to Cain and gave him Tobias' telephone number. (App. 1050, 1070–1071.)

[21] Cain testified at the trial that Huebner, Sullivan and he met Ed Sproull in the "early part" of 1948 and received the figures from Sproull in the "first half" of the year. (R. 2557–2558.)

(c) The scheme to buy out Lubben

In the latter part of June 1948, within days after the New York candy convention, Cain arranged a meeting with Lubben at the Riviera night club in New Jersey. The details of the meeting, which was also attended by Pat Grace and by Sam Davidson, Lubben's attorney,[22] were revealed by the testimony of Lubben and Davidson at the trial (R. 962–968, 1321–1324). Apparently, Cain disclosed that Internal Revenue agents had visited the Shotwell plant; that Graflund, "like a damn fool," had given them records of dealings with Lubben; and that "All hell has broken loose." (R. 964.) In order to deprive the government of its key witness, Cain asked Lubben to go to South America for a couple of years, suggesting that a syndicate could be formed with Ed Urban of Close and Company and Morley Cramer (both of whom had black market dealings with Lubben), that the syndicate would buy Lubben's property, and that Cain would give Lubben a lucrative Shotwell account when he returned to the United States. Lubben was advised to obtain a passport, to think the matter over, and to contact Grace in a few days. Cain also indicated he was attempting to settle the case through political contacts, and Grace announced he would go to the

[22] At the trial, Lubben and Davidson testified the meeting was held around August 1948. (R. 963, 1321.) Cain and Grace testified it was in the latter part of June 1948. (R. 2558, 2077.) It clearly was held in June, for Cain told Huebner about it when Cain returned to Chicago from the candy convention. Moreover, on the Sunday after Huebner returned to Chicago from the convention (June 27, 1948) Cain called Huebner from New York and asked for Lubben's telephone number. (App. 659–661.)

office of Daniel Bolich, at that time in charge of the New York Office of the Internal Revenue Intelligence Unit.[23] (R. 962–968, 1321–1324.)

After Cain and Sullivan returned to Chicago from the New York candy convention, Cain asked if Huebner had reported any of the Lubben payments on his income tax returns. When Huebner stated he had not, Cain said "that was fine, that was good." (App. 661.) At about the same time, and repeatedly thereafter, Sullivan instructed Huebner and Graflund that they were not to give the investigating agents any information: "Tell * * * [them] you don't know anything"; that Cain "was to do all the talking"; and that they were to "Keep quiet * * * [about the] tax matter or we may all become more involved." (App. 662, 689–691, 1077–1078.)

On the first Sunday after Cain and Sullivan returned to Chicago from the candy convention (July 4, 1948), Cain invited Huebner and Graflund to his home for the purpose of discussing possible lines of action in response to Special Agent Krane's visit to the Shotwell plant.[24] They talked about the receipts from Lubben and about Lubben's and Shotwell's records, but no decisions were reached. Cain indicated they would have to assemble records to see what had

[23] Grace, who testified at the trial, stated that he had mentioned the case to Bolich at a casual street corner meeting but that he had never been in Bolich's office. (R. 2083, 2088–2089.) In rebuttal, the government proved that a Mr. Grace had visited Bolich's office on June 28, 1948, and that a Mr. Grace and a Mr. "Kane" saw Bolich on July 12, 1948. (R. 2799–2802; Govt. Exs. 188A–188C, Ex. Vol. I, pp. 119–121.)

[24] Sullivan came to this meeting late and stayed only fifteen minutes.

actually taken place between Shotwell and Lubben. There was no mention of voluntary disclosure at the meeting or that an Internal Revenue Agent was coming to the Shotwell plant to examine Shotwell's books and records. (App. 662–665, 1052–1054.) Prior to this meeting, moreover, neither Cain nor Sullivan had ever told Huebner that a voluntary disclosure had been or would be made,[25] or that records concerning Shotwell's transactions with Lubben were being or should be collected. (App. 664.)

Lubben's recollection was that Cain had indicated at the Riviera nightclub meeting that he would see the Urbans of Close and Company when he returned to Chicago. (R. 1102.) This task, however, apparently was delegated by Cain to Sullivan. Shortly after the July 4, 1948, meeting in Cain's home, Sullivan and Huebner joined Ed Urban[26] at the Chicago Athletic Club, in a meeting arranged by Huebner at Sullivan's instructions. Sullivan asked Urban what he thought of forming a group with Shotwell and Morley Cramer[27] to buy Lubben's business interests, obtain his records and "do whatever we wanted with them." Nothing was said about voluntary disclosure at this

[25] At the original suppression hearing both Cain and Busby testified that Huebner participated in the alleged decision to make a disclosure in January 1948. (R. 176, 228–229.)

[26] Edward Urban was not available to give testimony at the second suppression hearing because he had suffered an acute cerebral hemorrhage and was hospitalized. (App. 1190.)

[27] Morley Cramer, president of Gum Products Company and Two-Star Confections in Boston, had received premium cash payments from Lubben. Lubben also had made over-ceiling payments to Close and Company and Edward Urban. (R. 1015–1017.)

meeting. (App. 665–666.) At about the same time, Cain arranged for an appraisal to be made of Lubben's factory in New Jersey. (App. 666–667.)

(d) Circumstances surrounding the "voluntary disclosure"

Subsequent to the Riviera night club meeting in the latter part of June 1948, Davidson tried on two or three occasions to call Pat Grace. When an appointment finally was arranged, and a meeting held in Grace's office, Grace said that Cain "had decided to make a voluntary disclosure" and that Lubben, who already had applied for a passport for South America, could forget about leaving the country." (R. 1092–1096, 1178, 1345–1346.)

In the middle of July 1948, Cain told Huebner, Gratlund and Roeser that they were going to meet at the Belden-Stratford Hotel to work out a disclosure. Gratlund was directed to bring to the hotel all the invoices, bills of lading, and papers on Lubben's companies. At the hotel meeting, which lasted several days, Cain, Huebner, Gratlund and Busby worked up computations (Deft. Ex. 1, suppression hearing, R. 3091–3095) of the over-ceiling cash receipts from Lubben. Huebner brought to the meeting certain records he had obtained from Lubben in February 1948.[29]

[28] Grace fixed the date of this meeting as July 15, 1948, at 3:30 p.m. (R. 2080.)

[29] After Cain learned that Lubben had maintained records of the cash payments, contrary to petitioners' instructions (R. 862–863; App. 624–626), Sullivan sent Huebner to get the records from Lubben in February 1948. Unknown to Huebner, Lubben first had the records photostated and then delivered them to Huebner in Chicago. Huebner kept them in his desk drawer from February to July 1948. (R. 866–868, 1046, 1314–1317; App. 643–650.)

Prior to that time, Graflund had not been asked by anyone to assemble or furnish any records or data relating to the black market receipts from Lubben. He knew of nothing previously done by Busby in regard to a disclosure to the government. (App. 667–669, 673–680, 1054–1070.)

Shortly after the Belden-Stratford Hotel meeting, Cain wrote out on a sheet the alleged black-market payments made by Shotwell (Deft. Ex. 16, suppression hearing, R. 3174) to offset the black market receipts.[30] He did this in three to five minutes without referring to any records or asking Huebner for any information. Giving the sheet to Busby, Cain said, "Here are the figures. Go by it." (App. 680–683.)

Either at the Belden-Stratford Hotel meeting or shortly thereafter, Cain disclosed that he had talked with Sauber concerning Shotwell's tax situation, and had told him, in substance, "Ernie, if it will help any, why don't we fix March 17 as the date, St. Patrick's day? That is an easy date to remember." (App. 1068–1069, 1242.)[31]

In late July or early August 1948, Cain told Huebner that everything was settled, that he had made a disclosure to Sauber, and that the disclosure date was June 15, 1948.[32] (App. 688–689.) After hearing

[30] Cain testified at the trial that he wrote out the figures on disbursements for raw materials in the "early part" of 1948. (R. 2585–2586.)

[31] Sauber adhered to this date in his testimony at the original suppression hearing. (R. 281–284.)

[32] This date is six days before Special Agent Krane asked for records of transactions with Lubben and five months subsequent to the date petitioners ultimately contended they had made a disclosure.

Sauber testify as a government witness at the first suppression hearing, contradicting the testimony of Busby and Cain as to the January disclosure date. Huebner asked Cain how Sauber could testify that the date was March 15 when Cain had said the disclosure date was supposed to be June 15. Cain said, "Shhh, nobody knows anything about this. Keep quiet." (App. 691.) Shortly thereafter, Busby told Huebner that (App. 692) "Sauber would not go back of March the 15th, 1948, for the disclosure date."

(c) The abortive plan to "fix" Shotwell's taxes

Gratfund took a Wisconsin vacation the last week of July and the first week of August 1948. Shortly before his departure, but after the Belden-Stratford Hotel meeting, Cain told Huebner and Gratfund he could settle the tax case for $20,000. This conversation occurred before any audit had been made of the Shotwell tax returns. (App. 683-685; 1071-1073.) In the first week of August 1948, Cain informed Huebner he had settled the tax case for a $20,000 deficiency, and the latter, by long distance telephone, relayed the

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Sauber could not go back of March 15, 1948, because he had committed himself to that date in a statement to Special Agent Krane on October 16, 1951, and in a prior statement to Revenue Agent Mammel. (Def. Ex. 3, suppression hearing, R. 3454.) Petitioners had to go back to January 1948 as a disclosure date. Cain had been in California during February and had not returned to Chicago until March 3. And they had learned that an informer was in the New York Internal Revenue office about March 3 or 4, 1948. (App. 924-926.) Their information was correct, for on March 4, 1948, an informant wrote a memorandum for the Internal Revenue Service, stating that Shotwell had received a large amount of cash premiums from Lubben. (R. 334-338; Govt. Ex. 5, suppression hearing, R. 3088.)

news to Graflund. (App. 686–687; 1073–1074.) When Graflund returned from vacation after the first week in August 1948, he told Cain that Busby was to be congratulated for getting such a favorable tax settlement. Cain shook his head and said that he, Cain, was the one to be congratulated. (App. 1074.)

Earlier, in July 1948, Cain had told Huebner he had to have $10,000 to take care of the tax trouble and that he had to get it from Huebner. Asked why a Shotwell check wasn't adequate for the purpose, Cain replied that a check could be traced. A few days later, Huebner gave $5,000 to Cain, who said, "I have got good news. I am going to be able to fix the tax case." (App. 684.) In August 1948, Cain told Huebner he had to have the other $5,000 (of the $10,000 to fix the tax case) that day, and that he was meeting someone at the Chicago Athletic Club. Huebner obtained the $5,000 and gave it to Cain at the office. The telephone rang and a Mr. Kennedy asked for Cain. Cain took the telephone and arranged to meet the caller at the Chicago Athletic Club in about half an hour. Cain told Huebner that Kennedy "was the in-between man who was taking care of our tax fix" and that he was going to meet him to give him the money. (App. 687–688.)

At the original suppression hearing, Sauber testified that about 30 days after his initial meeting with Cain, the latter called him to request that he arrange an audit of Shotwell's returns. (R. 285–286.) Sauber then called Ralph Johnson, a group chief in the Revenue Agent's Office, and asked him to have

the audit made.[34] The 1946 return was officially assigned by Group Chief Johnson to Internal Revenue Agent Lima on July 30, 1948. (App. 1345–1346; Deft. Ex. 15, suppression hearing, R. 3173.) In connection with the assigned audit, Lima, who had no knowledge that a purported disclosure had been made (App. 1348), spent only a few days at the Shotwell offices during the first week of August 1948 (App. 684–685, 1072–1073), at which time Busby gave him the summary sheet reflecting Shotwell's black market receipts and alleged offsetting disbursements for the years 1944, 1945 and 1946 (Deft. Exs. 1 and 13, suppression hearing, R. 3096, 3171; Govt. Ex. 186, Ex. Vol. I, p. 117; R. 188–189, 216, 310–324, 2804–2810.) On instructions from Group Chief Johnson, Lima took preliminary steps to prepare a report which would allow all the offsetting disbursements except the items for "sales expenses and unallocated," which amounted to $18,000 for 1945 and $20,661 for 1946, and resulted in a tax deficiency of approximately $20,000. (App. 1522–1523, 1528–1529; Govt. Ex. 186, Ex. Vol. I, p. 117.) This preliminary report was submitted to Group Chief Johnson for approval and returned to Lima with directions to hold it in his files. Some time later, Johnson and Lima, along with Special Agent Krane, attended a meeting in the office of Ray Williams, Chief of the Fraud Squad. No mention was made at this meeting of Lima's report

[34] Johnson did not have the Shotwell returns in his group for examination until July 21, 1948. The 1946 income tax return of Shotwell was assigned to Group Chief James Granahan for field investigation on December 16, 1947. The return was sent to Group Chief Johnson on July 21, 1948. The 1945 Shotwell income and excess profits tax returns had been audited and a report submitted on August 5, 1947. (R. 308–318, 389–393.)

or the proposed $20,000 settlement. Williams and Johnson disagreed as to how the case should be handled, and Williams told Lima to hold the matter in abeyance until he received further word from Williams. Subsequently, in the latter part of September, Johnson informed Lima that a fraud investigation was definitely scheduled, that the Intelligence Division had entered the case, and that Lima might as well tear up the preliminary report. He did so. (App. 1344–1368, 1532–1533.)

In late September or early October 1948, Busby told Huebner that there had been a meeting at the Fraud Section of Internal Revenue, that "hell had broken loose," that "the boys had a heck of time destroying the records for the purpose of billing Shotwell for taxes," and that the Intelligence Division was getting back into the case again. (App. 689.) Gratlund heard the same thing from Busby. (App. 1074–1075.)

In the latter part of 1948, Cain twice directed Gratlund to destroy the "corn box" record kept by Mrs. Morrill and also any related records. (R. 1743–1744; App. 1075–1077.) Late in 1949, acting upon Cain's instructions, Gratlund destroyed cost records which showed a discrepancy between inventory tonnage and the tonnage of finished products. Cain's instructions were to destroy anything of an "incriminating nature." (App. 1078–1082.)

Beginning in late 1949, Cain and Sullivan repeatedly objected to the Internal Revenue Agent in Charge concerning the investigation. Asked to whom they made the alleged black market expenditures, Sullivan

first said he knew, but wouldn't tell, and later said he didn't know." (R. 238–241; App. 1001–1003.)

In August 1951, Cain had a conversation in New York with Lubben and Davidson, in which he told them that Agents Krane and Mammel, who were conducting the investigation of Shotwell, were coming to New York to ask Lubben about "loans and exchanges" with Shotwell.[5] Lubben told Cain that he had no such transactions with Shotwell. Nevertheless, Cain urged Lubben to lie to the agents and tell them that such transactions had taken place. (R. 971.) "what difference does it make, Dave? I am trying to settle this case. * * * it doesn't mean anything to you * * * You are not liable. * * * It just reduces my tax liability." (R. 968–974, 1324–1328.)

SUMMARY OF ARGUMENT

I. The central issue in this case is whether petitioners are entitled on Fifth Amendment grounds to the suppression of the documents they delivered to the government—in reliance, they say, upon an offer of immunity—even though the record conclusively shows not only that petitioners flouted the conditions of that offer, but also that their disclosure was but a further step in a conspiracy "to fix" Shotwell's tax difficulties. Petitioners rest their argument for suppression primarily upon the dictum in *Bram* v. *United States*, 168 U.S. 532, that a confession induced by a promise of benefit to the maker is not the product of free choice

[5] "Loans and exchanges" were transactions in which one type of merchandise was exchanged for another. (R. 971.) They are frequently referred to in the record as "trade deals." (See, *e.g.*, R. 2007–2008.)

and hence, if used in evidence against him, would violate his privilege against self-incrimination under the Fifth Amendment. That Amendment specifically refers to a person "compelled" to be a witness against himself. It is inconceivable, however, that the rule barring the use of involuntary confessions should operate to exclude a declaration in which damaging admissions are inextricably intertwined with false self-serving exculpatory statements, submitted in an effort to exploit a conditional offer of immunity while continuing the original evasion of taxes and penalties whose payment was a condition precedent to the immunity offered.

We challenge the assumption that the disclosure here was, in any meaningful sense, "induced" by or made "in reliance" upon the government's offer of immunity. Where an offer promises a benefit only if certain conditions are met, an individual who schemes to avoid those conditions cannot claim that he is acting in reliance upon the offer merely because, by fraudulently feigning compliance, he attempts to reap the offered benefit. Such a person knows that the government is not promising immunity for fraud, but for the truth, and that if his deception is unmasked, he will be subject to prosecution. Therefore he does not rely upon the offered immunity.

The purpose of the voluntary disclosure policy was to make it possible for the government to collect taxes and penalties that might otherwise be recovered only through costly investigation. To that end, the Treasury Department offered an immunity from criminal prosecution to any taxpayer who came forward in good faith, before investigation had been

initiated, and made a complete and honest disclosure of all relevant facts. Nothing in the text or context of the Treasury Department's policy statements could possibly have justified any taxpayer in assuming that immunity from criminal prosecution would be extended to anyone who not only failed to cooperate in determining the true tax liability but who (as the trial court found) seized upon the disclosure policy as an opportunity to perfect concealment of true tax liability. If, under these circumstances, petitioners were still willing to hazard a disclosure, their reliance was not on the government's promise, which could not be operative as to them, but rather on the likelihood that the fraud would not be discovered. Their position, therefore, is no better than that of the ordinary suspect, to whom no promise of any kind is made, but who volunteers a confession upon a calculation that it will gain him lenient treatment.

This Court has made it quite clear that the confession which the Constitution requires to be suppressed is one which law enforcement officials extract from the maker through methods which overcome his will to resist, exploit his helplessness, or disable him from making a free choice. Here, it was not the government which sought to take advantage of the petitioners but petitioners who baited a trap for the government. Petitioners were not held in custody, interrogated, or even approached by any government agent prior to their disclosure. They were not accused of any wrongdoing. The conferences at which petitioners allegedly made the disclosure to Sauber, the government representative, were arranged at *their*

initiative, not his. This is not a case, moreover, in which a promise was made by a specific law enforcement officer to a specific person suspected or accused of having committed a specific crime. If the government exerted any influence at all on petitioners, it was solely through the medium of general statements of policy addressed to the public at large and having no reference to any specific person or situation. Plainly, this is not a case which defendant's "will has been overborne and his capacity for self-determination critically impaired." *Culombe* v. *Connecticut*, 367 U.S. 568, 602. Indeed, it would be difficult to imagine a declaration more patently the "product of an essentially free and unconstrained choice" than this one.

Moreover, it is surely not irrelevant to these considerations that the self-serving false statements here intertwined with the admissions were themselves criminal acts. The attorney-client privilege, for example, does not extend to communications made in the perpetration of a crime or fraud, or in the course of a conspiracy to commit one. So here, it is submitted, the privilege against self-incrimination should not extend to admissions contained in the same "package" with self-serving false statements made to continue and compound the original felony of tax evasion which was the subject of the admission.

We wish to emphasize that it is not our position that the admissibility of an inculpatory statement turns on its truth or falsity or the purity of the motives which impelled it. For example, a suspect who is subjected to intense psychological pressure by an over-zealous policeman and who confesses in order

to extricate himself from his predicament would obviously be entitled to the exclusion of that confession even though it may have been false and intended to deceive. But the rule which privileges a confession made in those circumstances certainly should not privilege a self-serving declaration which is initiated entirely by the maker himself; which is not in any real sense the product of reliance upon a commitment by the government; which is a further act in a continuing conspiracy to defraud the government of taxes; and which is itself a criminal act.

One final point should be mentioned. Petitioners argue that the false disbursements figures were immaterial to the corporation's tax liability, since under the then existing Treasury policy over-ceiling disbursements were disallowed in computing cost of goods sold. The suggestion that these fabricated figures were without legal significance is readily laid to rest: If the amounts were expended for inventory, there was a colorable claim that they were cost of goods sold. If, on the other hand, as the courts found, a substantial portion was a constructive dividend to executive stockholders, there would be no rational basis for a deduction and taxable income would be (and was) materially misrepresented.

II. In his opinion following the supplemental suppression hearing, Judge Nordbye—though finding the evidence "overwhelmingly clear" that black-market sums totalling between three and four hundred thousand dollars had been paid to Shotwell and the greater part of it appropriated by the individual petitioners for their own personal use—made the re-

mark that it was entirely probable that "Lubben may have exaggerated" the amounts of his payments. (Lubben, the government's key witness at the trial, had testified that he paid Shotwell $454,000 in black-market cash in 1945 and 1946.) Solely on the basis of this remark, petitioners, attributing to Judge Nordbye a "finding" that Lubben lied to the jury, demand a new trial. To characterize the court's comment as a "finding," however, grossly distorts its significance. At the outset of the supplemental hearing, Judge Nordbye made it clear that he was not going to retry any issue already presented to the jury. Moreover, the import of his remark, if read in context, is that, taking account of the possibility, in view of the lapse of time and the absence of records, that a government witness at the trial may have exaggerated and allowing, as it were, a margin for error, it was still overwhelmingly plain that petitioners had appropriated to their own use hundreds of thousands of dollars in black market money. Petitioners would now turn the judge's very moderation and judiciousness—his allowing for the possibility of exaggeration—into a "finding" that the government's case was tainted, whereas in fact his only findings of fraud and bad faith are those which lie heavily at petitioners' door.

Moreover, there is no basis whatever to petitioners' further contention that the evidence at the supplemental hearing showed Lubben to be a perjurer. In fact, far from discrediting Lubben's trial testimony, the evidence at the supplemental hearing powerfully corroborated it.

III. There is no merit to petitioners' charge that the representations made and affidavits sponsored by the government in this Court were found by the district court to be false, or that they were improper inducements to this Court's decision to remand the case for further proceedings. The principal affidavits presented to this Court by the government were those of Graflund, the Shotwell comptroller, and Huebner, the company's vice-president and plant manager. In addition, the government anticipated for the Court the testimony which Lima, the revenue agent who audited the company records, would give as a government witness at the supplemental hearing. From the record and findings at the supplemental hearing, two salient facts emerge: *First*, the government's three principal witnesses gave precisely the testimony which, this Court was advised, the government anticipated. *Second*, in the several volumes of testimony foreshadowed in the briefs and affidavits the government submitted to the Court, only a single assertion by a single witness was found by the trial judge to be inaccurate. And even that one inaccuracy, the judge found, was made innocently and in good faith.

Petitioners further allege that the government concealed from this Court certain prior inconsistent statements having a material bearing upon the credibility of the witnesses whose testimony it promised to produce. That allegation is wholly unwarranted. Plainly, the government was not asking the Court to resolve the factual issue raised by its new evidence

or to pass judgment upon the credibility of the witnesses. The purpose of the motion to remand was simply to bring to the Court's attention new evidence which, if believed by the trial court after being exposed to cross-examination in *that* forum—would support findings that the purported voluntary disclosure had been untimely and/or devoid of good faith. Moreover, even if this Court *had* been disposed to weigh the credibility of the government's proposed testimony—a fanciful premise—it would not have been assisted by a bare concession that this testimony would in certain respects deviate from previous testimony of the witnesses. A determination of a witness's credibility requires the fullest exploration of details and an appreciation of every nuance in his story. We fully agree that the government has an obligation to volunteer all relevant information and must err on the side of excessive candor, but the obligation is to help the Court administer justice. Here the test of helpfulness to the Court certainly did not require counsel to bring forward the possible weaknesses in the newly discovered evidence. Indeed, disclosure would have opened up more questions than it solved. If counsel mentioned these "weaknesses", would they not be guilty of half-truths if they failed to explain everything else that might be said against the evidence? If government counsel were to begin to report and appraise the weaknesses in the newly discovered evidence, they would also be warranted in describing all the corroborative information. Manifestly, all this would be quite collateral and unneces-

sarily burdensome because the veracity of the projected testimony was not then in issue.

Furthermore, even if it be supposed that counsel erred in failing to refer to the impeaching material, the worst that can be said is that they committed an error of judgment while acting in good faith. Such a mistake, even if it occurred, would not vitiate the careful findings of the district court made after a full review of all the relevant evidence.

Once the suppression hearing had commenced, government counsel were entirely cooperative in making available to the petitioners all of the prior statements and grand jury testimony of the government's witnesses, and indeed earned an accolade from Judge Nordbye for their "forthright attitude" and "commendable frankness" in this regard. (App. 1770.)

IV. In March 1958, more than four years after the verdicts, petitioners filed motions seeking dismissal of the indictment, a new trial, and other relief on the ground that the grand and petit juries were illegally selected because (1) the Jury Commissioner delegated his duties to one of his private employees; (2) volunteers were permitted to serve on the juries; and (3) the Clerk of the District Court used no method calculated to secure a cross-section of the population, but merely selected names from lists of private organizations and upon nominations of former jurors.

In an extensive opinion, Judge Nordbye held that any right to challenge the jury trials had been waived, that petitioners had made no showing which would warrant granting them relief from the waiver, that the juries in fact were not illegally constituted; and

that there was no illegal delegation of the Jury Commissioner's duties. The court, we submit, was right on all counts.

The short answer to petitioners' contentions is that they waived any right they may have had to question the method of choosing the grand and petit jurors. With respect to the grand jury, this conclusion is compelled by numerous authorities, as well as by Rule 12(b) of the Federal Rules of Criminal Procedure, which provides explicitly that objections based on defects in the indictment, unless raised by motion before trial, are waived. It is well settled, moreover, that a contention that a petit jury was not lawfully constituted, or that the panel was improperly selected, comes too late when made after the verdict. As Judge Nordbye observed, petitioners are attempting to challenge the jury panels in a collateral proceeding under the guise of newly discovered evidence. They face the obstacle, however, that a motion for new trial on the basis of newly discovered evidence must be supported by a showing that the evidence could not have been uncovered with due diligence at an earlier date. Here there is no question that the officials who selected the jury were available for examination at all times, and, of course, the fact that some of the members of the panel were volunteers could have been ascertained at the time the petit jury was constituted.

Moreover, petitioners have made no showing which would justify the court in granting them relief from this waiver. They do not contend that any irregularities in the selection process resulted in prejudice,

nor do they show that the membership of the grand jury was unrepresentative of the community at large. And, as the court found, the method of selecting jurors in the Northern District of Illinois had been followed for years, and an inquiry as to the system employed could have been made at any time.

V. The contention that the court improperly permitted the jury to consider the disclosure documents against Sullivan is frivolous. These exhibits were admitted only against Cain and the corporation, and the jury was instructed that any "statement or act of one of the defendants not in the presence of another defendant is not binding upon the absent defendants." In any event, Sullivan has no standing to object to this instruction, since he joined with the other defendants in *requesting* an instruction under which the jury might consider, on the issue of intent, the actions of the defendants pursuant to the voluntary disclosure policy.

ARGUMENT

I. No constitutional or other rights of petitioners were violated by the admission into evidence of documents they submitted to the government pursuant to a conspiracy on their part to defraud the United States and evade taxes

The central issue in this case [*] is whether petitioners are entitled on Fifth Amendment grounds to the

[*] Petitioners have apparently abandoned their contention (Pet. 7, 35–36) that they should have had a jury trial on the suppression issue. In any event there was no merit in it, for both at the pre-trial suppression hearing (R. 126) and at the trial (R. 2739, 2741, 3209–3210), petitioners waived submission of the issue to the jury and asked that it be decided by the court. Nor did the petitioners request any instruction under

suppression of the documents they delivered to the government — in reliance, they say, upon an offer of immunity — even though the record conclusively shows that petitioners not only flouted the conditions of that offer, but also made their disclosure as a step in a conspiracy to "fix" Shotwell's tax difficulties by continuing and perfecting the original tax evasion.

The principal documents sought to be suppressed are government Exhibits 185, 186, and 189A-E. Of these, the most important is Exhibit 186 (Pet. 85; Ex.

which the jury would have been permitted to consider the admissibility of the disclosure materials. (R. 3198-3215.) This Court, in its opinion remanding the case to the District Court for *de novo* resolution of the suppression issue, declined (at 388 U.S. 244, fn. 10)

"Respondents did not urge below, nor do they suggest here, that the question of admissibility of the disputed evidence was properly an issue for the jury. Rather their contention has been that the judge should have sustained the motion to suppress."

Petitioners's [illegible] should have [illegible] suppression [illegible] principal [illegible] That issue was not presented [illegible] we submit, is [illegible] of itself, any of the questions [illegible] presented. Moreover, the issue was raised in the Conditional Cross-Petition for a Writ of Certiorari No. 47, Oct. Term, 1966, as to which certiorari was granted (385 U.S. 968), thus leaving in force the Seventh Circuit's holding that petitioners are not entitled to immunity.

Apart from these special "disclosure" documents, the government also introduced at the trial ordinary corporate records of various kinds, and these are also embraced in petitioners' motion to suppress. However, the Fifth Amendment's privilege against self-incrimination does not protect either the corporation or its officers with respect to such corporate records. *Logan v. United States*, 340 U.S. 367, 371-72; *United States v. White*, 322 U.S. 694, 699, 701.

Vol. I, p. 117), the summary prepared by Busby and handed over to Lima on the first day of his visit to the Shotwell plant in early August 1948. This document shows both the unreported black market income received from Lubben during 1945 and 1946, in the amount of $366,000, and the fictitious disbursement figures prepared by Cain, resulting in a "terminal" balance of $5,898. Exhibit 189A E (Pet. 86-90; Ex. Vol. I, pp. 122-126), is comprised of the work sheets prepared by Busby in arriving at the $366,000 figure shown in Exhibit 186, and was given to Special Agent Krane in August 1948.* Exhibit 185 (Ex. Vol. I, p. 116) consists of Cain's handwritten draft of false disbursement figures, which he prepared in July in "less than a minute", (*supra*, p. 16), and which was turned over to Krane at a date not specified in the record. (R. 398.) Exhibit 185 was admitted against Cain and the corporation during the cross-examination of Cain (R. 2587-2589); Exhibits E 6 and 189A E were received in evidence against Cain and the corporation during the government's rebuttal case (R. 2811-2812, 2817).** None of these documents was admitted against Sullivan. (R. 2589, 2611, 2812, 2817.) A portion of Cain's testimony at the suppression hearing, largely

*Busby testified at the original suppression hearing that he had delivered these documents to Krane on August 1, 1948. In fact, however, the date must have been somewhat later, since there is no evidence in the record that Krane made a second visit to the Shotwell plant at any time prior to Lima's visit there in the first week of August.

**While we do not stand on the point, and while it is not essential to our argument, we suggest that the Fifth Amendment's privilege against self-incrimination, even if it were applicable to documents delivered to the government under cir-

paralleling the contents of the above documents, was read into evidence near the close of the government's case-in-chief. (R. 1941-1951.)

A. The fictitious disbursement figures had a material effect upon the corporation's tax liability and were not, as petitioners portray them, merely harmless balancing entries.

As a preliminary to their constitutional argument, petitioners seek to minimize the legal significance of the false disbursement figures. They take the position that it was immaterial to the corporation's tax liability whether the black market receipts were paid out for the purchase of black market raw materials, as they alleged in their disclosure, or taken as constructive dividends by petitioners themselves, since under then-existing Treasury policy [9] overceiling disbursements were disallowed in computing cost of goods sold, for the purpose of reducing gross receipts to gross income. Accordingly, they say, the admittedly fictitious disbursements were thrown into their disclosure merely to provide balancing entries for the receipts. (Br. 17, 23, 68.)

The suggestion that these fabricated figures were without legal significance is readily laid to rest. In the first place, at the time of the alleged voluntary disclosure, the tax status of purchase outlays in ex-

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cumstances such as those involved here, may not operate to prevent their introduction for purposes of impeachment or rebuttal. *Walder* v. *United States*, 347 U.S. 62, holds that evidence, though illegally obtained, is nevertheless admissible on the issue of petitioner's credibility if on direct examination he opens the door to such admission by "affirmatively resort[ing] to perjurious testimony in reliance on the Government's disability to challenge his credibility." (*Id.*, p. 65.)

[9] See I.T. 3724, 1945 Cum. Bull. 57.

cess of O.P.A. ceilings was an unsettled matter. The Commissioner's view that such expenses could not be included in the cost of goods sold was even then being challenged in the Tax Court, and a decision adverse to the government was handed down in December 1948.[9] Thus, if the amounts were expended for inventory, there was a colorable claim that they were cost of goods sold. If, on the other hand, as the courts found, a substantial portion was a constructive dividend to executive stockholders, there would be no rational basis for a deduction and taxable income would be (and was) materially misrepresented. Cf. *United States* v. *Regan*, 311 U.S. 513. Indeed, Cain according to his own testimony at the original suppression hearing (R. 232, 252), expressly advised Sauber in March 1948 that the corporation reserved the right to sue for a refund if petitioners concluded that the Government's disallowance of the overceiling disbursements was erroneous.

Secondly, the government's evidence, in the main accepted by the district court, established that petitioners were *not* prepared to pay the additional tax properly applicable to their unreported receipts, but instead were attempting to arrange with internal rev-

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[9] *Sullenger* v. *Commissioner*, 11 T.C. 1076. This decision was followed by a number of decisions to the same effect in the courts of appeals. *Commissioner* v. *Heininger*, 198 F. 2d 297 (C.A. 5); *Commissioner* v. *Jaminet*, 198 F. 2d 295 (C.A. 5); *Jones* v. *Hedges*, 198 F. 2d 544 (C.A. 10); *Commissioner* v. *Heineman*, 197 F. 2d 221 (C.A. 1). The Commissioner acquiesced in these decisions prior to the original hearing on the motion to suppress (see 1952 2 Cum. Bull. 7).

cruit agents an immensely favorable civil settlement whereby all but a small fraction of the alleged black market disbursements would, notwithstanding the Commissioner's policy, be allowed as deductions. Petitioners can scarcely be heard to say that the fabricated disbursement figures were immaterial to the corporation's tax liability because the Treasury would have disallowed such expenses, when in their case the local revenue agent agreed to accept the fraudulent representation that these were such expenses, to allow them as cost of goods sold, and thereby substantially "wash out" the petitioners' civil liability.

Thirdly, if the unreported black market receipts were washed out by unclaimed disbursements which petitioners had *believed* to be deductible, the government would gain the impression (albeit false) that petitioners had not willfully understated their taxable income, so that petitioners would be likely to escape the heavy civil fraud penalties, amounting to 50%, of the tax deficiency, which would otherwise have been assessed against them under Section 293(b) of the Internal Revenue Code of 1939. The fabricated figures were highly significant, legally and in money consequences.

One further point should be mentioned. Petitioners assert (Br. 69) that in making a disclosure with respect to the tax liability of the corporation, they were not obliged to "turn informer" on the persons who received the black market moneys, even if those persons were the individual petitioners themselves—*i.e.*, to apprise the government that they had received unreported personal

income in the form of constructive dividends of the Lubbgn moneys. It is one thing, however, merely to keep silent about the ultimate disposition of these corporate receipts. It is an entirely different thing to use the purported voluntary disclosure as the occasion and the vehicle for manufacturing and communicating affirmative misrepresentation, concocted, as the court found, for the express purpose of misleading the tax officials as to the corporation's tax liability (App. 1766) and having an inevitable tendency to impede the discovery of petitioners' own personal tax evasion.

The above considerations, we believe, thoroughly discredit the notion that the fabricated outlays to "nameless and faceless" people were merely innocent balancing entries, or indeed anything other than a calculated effort to defraud the government of taxes and civil penalties which petitioners rightly owed.

B. The admission of the disclosure documents did not violate any constitutional rights of petitioners

Petitioners take the position that the documents turned over to the government should be suppressed even though the disclosure may have been fraudulent and in bad faith. They rest this contention primarily upon the dictum in *Bram* v. *United States*, 168 U.S. 532, repeated in other cases,[*] that a confession induced by a promise of benefit to the maker is, *ipso facto*, not the product of free choice, and hence, if used against him, would violate his privilege against

[*] See, *e.g.*, *Hardy* v. *United States*, 186 U.S. 224, 229; *Wan* v. *United States*, 266 U.S. 1, 14; *Smith* v. *United States*, 348 U.S. 147, 150.

self-incrimination under the Fifth Amendment." This Court, however, has never suggested that an incriminating statement made in reliance upon a promise of immunity should be inadmissible under all circumstances and to every extent. See *United States* v. *Shotwell Mfg. Co.*, 355 U.S. at 248 (Mr. Justice Black dissenting). The rule barring the use of involuntary confessions evolved primarily for the purpose of protecting the individual against self-incrimination through untrustworthy confessions extracted from him against his will under physical and psychological pressures improperly exerted by the policeman and the prosecutor. No doubt the rule has other applications as well. But it is inconceivable that it should operate to exclude a declaration in which damaging admissions are inextricably intertwined with false self-serving exculpatory statements, submitted on the maker's own initiative in an effort to exploit a conditional offer of immunity while continuing

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Petitioners also invoke the common law rule of exclusion, as elaborated by Professor Wigmore. See 3 Wigmore, *Evidence* (3d Ed. 1940), § 822. Wigmore attributes to that rule the sole purpose of excluding confessions which are "testimonially untrustworthy." This Court, however, in decisions enforcing the due process clause of the Fourteenth Amendment, has made it clear that "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba* v. *California* 314 U.S. 219, 236. See *Culombe* v. *Connecticut*, 367 U.S. 568, 583, fn. 25. It may be that the unreliability of forced confessions has been subordinated as a ground for their exclusion because of the protection afforded by the separate rule that a confession must be corroborated by independent evidence before it can support a conviction. See *e.g.*, *Opper* v. *United States*, 348 U.S. 84. Here, of course, the disclosures sought to be suppressed were overwhelmingly corroborated by independent testimony.

the original evasion of taxes and penalties whose payment was a condition precedent to the immunity offered.

We emphasize, moreover, that this is not a case in which a promise was made by a specific law enforcement officer to a specific person suspected or accused of having committed a specific crime." Whatever

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" Petitioners allege that Sauber assured both Busby and Cain that they would be entitled to the immunity offered by the Treasury's voluntary disclosure policy. (Br. 11.) And indeed Sauber himself testified at the original suppression hearing that he had told Cain "in my opinion this was strictly a civil case." (R. 285.) This assurance, however, was based upon Cain's representation to Sauber that "no one in Shotwell Manufacturing Company profited by these transactions." (R. 285.) Apparently neither Cain nor Busby advised Sauber of the amounts of the black market receipts and disbursements, but merely generalized that such transactions had been made. In his memorandum decision at the end of the trial, Judge Nordbye declared (R. 3246):

"* * * I am convinced from the evidence produced on the motion that no promise of immunity was held out to these defendants, or any of them, by any representative of the Government when these alleged disclosures were made, or at any other time. Moreover, I am satisfied that there were no representations by any Government representative which would lead these defendants to believe that the alleged disclosure would be considered a voluntary disclosure within the purview of the voluntary disclosure doctrine."

No further evidence as to communications between Sauber and Cain or Busby was given at the supplemental hearing. In his memorandum decision at the end of this hearing, Judge Nordbye found that Sauber probably "informed Cain and Busby that, if they made an *honest, bona fide voluntary disclosure*, there would be no criminal prosecution * * *." (App. 1761—emphasis added.) In short, Sauber's so-called "assurances" added nothing whatever to the general statements of the Treasury Department announcing the voluntary disclosure policy. Like those general statements, Sauber's assurances were based upon the assumption that the taxpayers would make a full, honest, bona fide disclosure of the facts relating to the corporation's tax liability.

may be the result in cases of specific coercion or inducement, we respectfully submit that concern about such cases should not bar introduction of fraudulent disclosures made in an effort to exploit a general statement of policy addressed to the public at large and having no reference to any specific taxpayer or specific case of tax evasion.

That the dictum in *Bram*, upon which petitioners rely, has no application to the facts of this case is further indicated by the following considerations:

1. We challenge the assumption that the disclosure here was, in any relevant sense, "induced" by or made in "reliance" upon the Government's offer of immunity. We do not deny that in turning records over to the government petitioners may have been prompted, in part at least, by the desire to avoid criminal prosecution. But where an offer promises a benefit only if certain conditions are met, an individual, scheming to avoid those conditions, cannot claim that he is acting in reliance upon the offer merely because, by fraudulently *feigning* compliance with the conditions, he attempts to reap the offered benefit. Such a person knows that the government is not promising immunity for fraud, but for the truth, and that if his deception is unmasked, he will be subject to prosecution. Therefore, he does not rely upon the offer of immunity.

The purpose of the voluntary disclosure policy was to make it possible for the government to collect taxes and penalties that might otherwise be recovered only through extended and costly investigation, if at all. To that end, the Treasury Department

offered an immunity from criminal prosecution to any taxpayer who came forward in good faith, before an investigation had been initiated, and made a complete and honest disclosure of all relevant facts. At the time of petitioners' disclosure, the most recent and authoritative statement of the Treasury Department's policy stressed that the offer of immunity "presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability." (Press release of Secretary Snyder's statement, issued May 25, 1947, R. 5141, Appendix, *infra*.) Other statements were less explicit. In any event, nothing in the text or context of the Treasury Department's policy statements could possibly have justified any taxpayer in assuming that immunity from criminal prosecution would be extended to one who not only failed to cooperate in determining the true tax liability, but who (as the trial court found) seized upon the disclosure policy as an opportunity to perfect concealment of the true tax liability. (App. 1762–1763, 1766.) If, under these circumstances, petitioners were still willing to hazard a disclosure, their reliance was not on the government's promise, which could not be operative as to them, but rather on the expectation that the fraud would not be discovered and that the half-truth disclosure would help prevent discovery. In essence, they stand in no better position than the ordinary suspect, to whom no promise of any kind is made, but who nevertheless volunteers a confession upon a calculation that it will gain him lenient treatment. No one has ever suggested that a confession motivated by such a calculation could not

be used in evidence against its maker, and, likewise, that suggestion must fail here.

While the precise point has never been decided,[45] several federal courts have considered the closely analogous question whether a taxpayer who purports to make a voluntary disclosure, in reliance upon the offer of immunity, although he knows that the policy is inapplicable because an investigation of his case is already underway, is entitled on constitutional grounds to have the disclosed documents excluded from evidence. Uniformly the decision has been that such documents are properly admitted.[46] The ration-

[45] However, in *Centpacchio* v. *Garrity*, 198 F. 2d 382, 389 (C.A. 1), certiorari denied, 344 U.S. 866, Judge Magruder declared, by way of dictum, that:

"* * * If it be assumed for the moment that evidence disclosed to the Treasury officials on the faith of the announced voluntary disclosure policy, and in compliance with its conditions, should be excluded from evidence in a subsequent criminal trial, *it would seem that the taxpayer would have to satisfy the court that he made a voluntary, good faith disclosure of all data necessary to a correct computation of his income tax deficiencies, and that he made such disclosures before an investigation was underway.*" [Emphasis added.] See also *Bateman* v. *United States*, 212 F. 2d 61, 65–66 (C.A. 9); *In re Monroe*, 110 F. Supp. 507 (N.D. Tex.).

[46] *White* v. *United States*, 194 F. 2d 215, 217–18 (C.A. 5); *Bateman* v. *United States*, 212 F. 2d 61, 65–66 (C.A. 9); *United States* v. *Lustig*, 163 F. 2d 85, 88–89 (C.A. 2), certiorari denied, 332 U.S. 775; *United States* v. *Weisman*, 78 F. Supp. 979 (D. Mass.). Indeed, the admission of the evidence has been upheld even where the defendant was *not* aware of the untimeliness of his disclosure, although there the result may be more doubtful. *Lapides* v. *United States*, 215 F. 2d 253, 256 (C.A. 2). *Contra*, *In re Liebster*, 91 F. Supp. 814 (E.D. Pa.). In still other cases where motions to suppress were denied, the

able which underlies these cases, though not fully spelled out in the opinions, is that a taxpayer who voluntarily turns documents over to the government, even though he knows that his disclosure does not meet the conditions of the Treasury's immunity policy, cannot afterwards be heard to say that he "relied" upon that policy and for that reason is entitled to the suppression of those documents. This principle, we submit, applies with equal force where the defect which vitiates the disclosure is not untimeliness, but fresh and material misrepresentation of taxable income.

We might add that *Rex* v. *Barker*, 2 K.B. 381 (1941), 3 All England Reports 33 (1941),[*] quoted at length in petitioners' brief (Br. 70–71), is entirely inapposite. That case involved the question whether certain documents produced by Barker in the course of an investigation by revenue agents were properly admitted in evidence against him. During the investigation the agents on two occasions read to Barker extracts from the so-called "Hansard statement," which, like the Treasury's voluntary disclosure policy in our case, held out immunity from prosecution to any taxpayer who "comes forward with a *full and frank disclosure*, of past frauds." [Emphasis sup-

court did not mention whether the defendant knew at the time he made the disclosure that it was untimely. See *Monroe* v. *United States*, 215 F. 2d 81, 84 (C.A. 5), affirming *In re Monroe*, 110 F. Supp. 507 (N.D. Tex.), certiorari denied, 348 U.S. 911; *United States* v. *Levy*, 99 F. Supp. 529, 533–34 (D. Conn.).

[*] The latter report is the more complete.

plied.]" The documents submitted by Barker after the first reading of this statement did not disclose the full extent of the fraud upon the revenue, and he raised no question as to the admissibility of *those* documents. After the second reading of the statement, Barker produced other documents which *did* disclose the full extent of the fraud, but were nevertheless admitted against him at the trial. His conviction was reversed on the ground that these latter documents fully disclosing the fraud should not have been admitted since Barker had produced them in reliance upon the promise or inducement expressly held out to him by the agent who read him the extract.

2. We assume that the constitutional prohibition against the use of involuntary confessions has the same scope when applied to State prosecutions under the Fourteenth Amendment as it does when applied to federal prosecutions under the due process and self-

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[48] Petitioners quote a portion of the "Hansard statement" at p. 70 of their brief. Immediately following the excerpt quoted by petitioners there is this language (2 K.B. at 382):

"Cases not infrequently arise in which the disclosure, though in a sense voluntary, is not made on the initiative of the taxpayer. For example, the taxpayer may have been requested to furnish accounts or further particulars in connection with accounts already rendered or the production of books may have been suggested. *If in such a case the taxpayer forthwith comes forward with a full and frank disclosure of past frauds, this would be accepted by the board as equivalent to a voluntary disclosure* to the extent that the board would not institute criminal proceedings, but would accept a pecuniary settlement." [Emphasis added.]

incrimination clauses of the Fifth Amendment." Decisions of this Court under the former clause emphasize that the confession which the Constitution requires to be suppressed is one which law enforcement officials extract from the maker through methods which overcome his will to resist, exploit his helplessness, or disable him from making a free choice. Such methods are offensive to the concept, basic to our judicial system, that "men are not to be exploited for the information necessary to condemn them before the law." *Culombe* v. *Connecticut*, 367 U.S. 568, 581.

This rationale is carefully spelled out in *Rogers* v. *Richmond*, 365 U.S. 534, 540-541, where the Court declared:

> Our decisions under [the Fourteenth] Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i.e.*, the product of coercion,

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"This Court recently pointed out that "the concepts underlying the rule excluding coerced confessions and the privilege against self-incrimination have become, to some extent, assimilated." *Culombe* v. *Connecticut*, 367 U.S. 568, 583, fn. 25. And in *Leyra* v. *Denno*, 347 U.S. 556, 558, fn. 3, the Court, referring to its "settled view * * * that coerced confessions cannot be admitted as evidence in criminal trial", announced that some members reached this conclusion "because of their belief that the Fourteenth Amendment makes applicable to the states the Fifth Amendment's ban against self-incrimination."

We recognize, of course, that this Court, through the exercise of its supervisory powers over the federal courts, may adopt rules of evidence for federal trials which are more exclusive than those which flow from the Fifth Amendment itself. See *Mallory* v. *United States*, 354 U.S. 449; *McNabb* v. *United States*, 318 U.S. 332. The circumstances of the present case, however, afford no basis whatsoever for the adoption of such a rule of evidence here.

either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. * * * To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.

More recently, in *Culombe* v. *Connecticut, supra*, at 602, the Court defined the test of admissibility in the following terms:

> * * * The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. *Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.* * * * *The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.* (Emphasis added.)

If the test of voluntariness has proved difficult to apply, it is because in nearly every decided case the confession was obtained under circumstances which were *inherently* coercive. In the typical situation, a person suspected of a crime is taken to the police station and there, while surrounded by hostile forces and isolated from his friends, he is subjected to more or less prolonged interrogation. When an individual stands helpless in that predicament, questions, exhortations, and even the suspicion of the authorities may have a tendency to sway his mind and numb his capacity for resistance. For example, in *Bram* v. *United State*, *supra*, upon which petitioners heavily rely, a person accused of murder was taken to a detective's office, questioned while stripped of his clothing, and tricked by the detective into making the statement which was later introduced against him as a confession. And in *Rogers* v. *Richmond*, *supra*, also cited by petitioners, a person accused of murder was

intermittently interrogated for six hours by a team of three police officers, and confessed only when the police chief indicated that he was about to have the prisoner's arthritic wife taken into custody."

The present case lies at the opposite pole from *Bram*, *Rogers*, and other cases where confessions were held to be involuntary. Here it was not the government which sought to take advantage of petitioners, but petitioners who baited a trap for the government. Petitioners were not held in custody, interrogated, or even approached by any government agent prior to their disclosure. They were not exposed even for a moment to the hostile and isolating atmosphere of a police station or other place of detention. They were not accused of any wrongdoing. The conferences at which Cain and Busby allegedly made the crucial admissions to Sauber were arranged at *their* initiative, not Sauber's. If the Treasury exerted any influence at all on petitioners, it was, as we have pointed out, solely through the medium of general statements of policy, addressed to the public at large and having no reference to any specific person or situation.[51] Plainly, this is not a

[50] The *Rogers* case simply stands for the principle that the courts, in passing upon the admissibility of a confession secured by improper means, may not take into account the likelihood that the confession is true. It has no bearing on the case at bar, where the overreaching and improprieties were committed, not by the government, but by petitioners, and where the fraudulent and self-serving character of the disclosure, for reasons given earlier, undercuts any contention that it was the product of reliance upon a commitment by the government.

[51] See *supra*, p. 59, fn. 44.

case in which the defendant's "will has been overborne and his capacity for self-determination critically impaired." *Culombe v. Connecticut*, *supra*. In fact, it would be difficult to imagine a declaration more patently the "product of an essentially free and unconstrained choice" than this one.

An entirely different question would, of course, be presented if petitioners had made a full, fair and timely disclosure and then been subjected to criminal prosecution. In that situation, even if it were held that the promise of immunity was legally unenforceable, petitioners, having relied in good faith upon the assurances of the Treasury, might be entitled to the exclusion of the disclosed documents. There, however, the reason for the exclusion would not be that the disclosure was extracted from the defendant against his will, but rather that it was elicited by the government through trickery and under false pretenses, official misconduct which the courts will not tolerate.[8] This is not such a case.

We wish to emphasize that it is not our position that the admissibility of an inculpatory statement turns on its truth or falsity, or on the purity of the motives which impelled it. For example, a suspect who is subjected to intense psychological pressure by an overzealous policeman and who confesses in order to extricate himself from his predicament would obviously be entitled to the exclusion of that confession even though it may have been false and intended to deceive.

[8] See *Crawford v. United States*, 219 F. 2d 207, 209-211 (C.A. 5). Cf. *Gouled v. United States*, 255 U.S. 298, 306.

But the rule which privileges a confession made in those circumstances certainly should not privilege a self-serving declaration which is initiated entirely by the maker himself; which is not in any real sense the product of reliance upon a commitment by the government; which is a further act in a continuing conspiracy to defraud the government of taxes; and which is itself a criminal act."

3. The documents the petitioners seek to have suppressed can scarcely be deemed the products of compulsion, in the face of overwhelming evidence in the record that they were delivered to the government pursuant to a plan of still further tax evasion. Revenue Agent Lima appeared at the Shotwell plant in the first week of August to audit the company's records (see p. 39, *supra*). Up to that point, petitioners had not made available to the government any of the figures pertaining to their tax liability. Lima's arrival presented them with a clear and unfettered choice between two alternative courses of action. On the one hand, they could make a clean breast of their black market transactions, pay the taxes and penalties due on the unreported receipts, and thereby earn immunity from criminal prosecution. In the alternative, they could feed Lima the records containing the fictitious disbursement figures Cain had prepared in July, and thus sacrifice the carefully conditioned right to immunity, in an endeavor surreptitiously to escape criminal prosecution while evading the taxes [redacted] whose payment was a condition to the immunity right.

[redacted]

[redacted] See *infra*, pp. 71–72, fn. 54.

They freely chose the latter course. Even prior to Lima's visit, Cain told Huebner that he could settle the tax case for a $20,000 deficiency and, in another conversation, that he had to have $10,000 to take care of the tax trouble. And the same week in which Lima audited the corporation's records, Cain advised Huebner that a settlement on the basis of a $20,000 deficiency had been arranged. Meanwhile, acting under the instructions of his superior, and using the figures contained in Busby's summary, Lima took preliminary steps to prepare a report which contemplated the allowance of a deduction of virtually all of the fictitious black market disbursements, with a resulting deficiency of only $20,000. It was only when the Fraud Section intervened in the case in the latter part of September 1948 that this collusive settlement was thwarted and Lima's preliminary report ordered to be destroyed. (App. 685–686; 686–688; 1071–1074; 1344–1368; 1382–1533; *supra*, pp. 37–40.) In light of this unfolding pattern of fraud and connivance, aptly characterized by Judge Nordbye as Cain's "machinations" (App. 1768), it is absurd for petitioners now to seek refuge in the assertion that their disclosures were merely the product of reliance upon the Treasury's immunity policy.

4. It is surely not irrelevant to these considerations that the self-serving false statements here intertwined with the admissions were themselves criminal acts.[54]

[54] See *United States* v. *Beacon Brass Co.*, 344 U.S. 43 in which this Court held that the making of false statements to a Treasury representative in a willful attempt to evade taxes constituted a violation of Section 145(b) of the Internal Revenue Code of 1939. Such statements would also violate 18 U.S.C. 1001, the general "false statements" statute.

The attorney-client privilege, for example, does not extend to communications made in the perpetration of a crime or fraud, or in the course of a conspiracy to commit one.[55] So here, it is submitted, the privilege against self-incrimination should not extend to admissions contained in the same "package" with self-serving false statements made to continue and compound the original felony of tax evasion which was the subject of the admission.

II. Petitioners' convictions were not secured on the basis of perjured testimony by Lubben; nor did Judge Nordbye so find

Petitioners contend (Br. 3, 50, 62, 84–89, 111) that the district court should have granted a new trial because, they say, the court found on the supplemental hearing that Lubben had perjured himself at the trial as to the amounts of the payments made to Shotwell. This assertion, which was made repeatedly to Judge Nordbye after the supplemental hearing, is wholly without substance. Although this Court stated in its 1957 opinion in the instant case that the jury's "verdict clearly must stand or fall on the sufficiency of the evidence already introduced at the trial" (355 U.S. 233, 244), we agree, of course, that if it appeared at the supplemental hearing that the convictions had been secured on fundamentally false testimony a new trial should be ordered. No such finding, however, was made by Judge Nordbye, nor would the evidence at the suppression hearing have supported one.

[55] 8 Wigmore, *Evidence* (3d ed.), Sec. 2298; *Pollack* v. *United States*, 202 F. 2d 281 (C.A. 5), certiorari denied, 345 U.S. 993. Cf. *Clark* v. *United States*, 289 U.S. 1, 15 (dictum); *Alexander* v. *United States*, 138 U.S. 353, 360.

A. Judge Nordbye's comment on Lubben's trial testimony

At the trial, the government introduced evidence showing that the unreported income Shotwell received from Lubben in 1945 and 1946 amounted to about $454,000 (R. 1838–1840, 1844–1846, 2064–2066). The jury, of course, made no finding as to the total amount of the unreported income, and no judicial determination on this point has been made at any time.

In his opinion following the rehearing of the suppression issue, Judge Nordbye stated (App. 1758–1759):

> * * * that Lubben may have exaggerated the amounts of the payments that he and his confederates made to Shotwell is entirely probable. But the evidence is overwhelmingly clear that not only were substantial sums of black-market money paid to Shotwell as premium payments by Lubben during 1944, 1945 and 1946 totaling between three and four hundred thousand dollars, but also that the greater part of this so-called black-market money was appropriated by Cain, Huebner and Sullivan for their own personal use. * * *

Solely on the basis of this statement, petitioners attribute to Judge Nordbye a "finding" (Br. 86) that "Lubben lied to the jury to the extent of at least $132,000" (Br. 86). Such an allegation grossly distorts the significance of the court's remarks. Judge Nordbye did not purport to make any findings whatever as to the exact amount of money Shotwell received from Lubben. Indeed, at the very beginning of the supplemental hearing he made it clear that he was not going to retry issues that had been presented to

the jury. Government counsel immediately agreed, stating that the government proposed to adduce only evidence controverting the motion to suppress, that it had "no intention of ascertaining or asking this Court to ascertain what Shotwell's tax liabilities were, is or might have been," and that the government's evidence would go only to the good faith and the timeliness of the alleged voluntary disclosure. (App. 541.) Accordingly, neither the government nor the court attempted, during the proceedings on remand, to establish the total of Shotwell's black market receipts.

The court's comment as to Lubben's possible exaggeration is to be read in context. In its opinion (App. 1758), after noting that the events in question had taken place fourteen years earlier and that no record of the premium payments had been kept by Shotwell or any of its officers, the court said it was "perfectly understandable" that Huebner's memory might not be too clear as to the amounts of money received from Lubben, the disposition of the money, and the circumstances of the transactions. But, the court concluded, Huebner's testimony was "reasonably consistent and compatible with the testimony given by the Government witnesses at the trial regarding these payments." It was at this point that the court noted that, although Lubben may have exaggerated the amounts of the payments, it was "overwhelmingly clear" that Shotwell had received between $300,000 and $400,000 from Lubben in premium payments. In other words, it was the Judge's conclusion that, although Huebner and Lubben, because of the lapse of time and the absence of records,

may have been mistaken as to the precise amounts of money involved, they were generally in agreement, and the amounts were clearly very substantial.

We have here a case in which a most careful and conscientious judge, familiar with the case from its beginning, has stated that, taking account of the possibility that a government witness at the trial may have exaggerated and allowing, as it were, a margin for error, it was still overwhelmingly plain that petitioners had appropriated to their own personal use hundreds of thousands of dollars of black market money. Petitioners would now turn the judge's very moderation and judiciousness—his allowing for this possibility of exaggeration—into a "finding" that the government's case was tainted, whereas in fact his only findings of fraud and bad faith are those which lie heavily at petitioners' door.

B. Evidence at the suppression hearing bearing on Lubben's trial testimony

In a motion for a new trial filed after the supplemental hearing, petitioners alleged (App. 1775–1776) that it appeared from the government evidence adduced at the hearing, as well as from the court's findings, that the convictions were based upon false and perjurious evidence. In argument on the motion, petitioners contended that Lubben's books had been shown to be false; that the evidence at the supplemental hearing established that Lubben had perjured himself at the trial; and that the court itself had found that Lubben's testimony was perjurious. (App. 1781–1784, 1795–1796.) In denying the motion for new trial (App. 1796), Judge Nordbye rejected

all of these contentions. During the arguments, he noted that the supplemental hearing was not a retrial of the issues before the jury; that the only issue in any sense retried was the disposition of the Lubben payments, and that issue only insofar as it had a bearing upon the good faith of the alleged disclosure; that there was no variance between the evidence at the trial and the evidence at the supplemental hearing, except that it was now clear where the Lubben money had gone; and that he would grant a new trial if he thought there was a miscarriage of justice, but that he did not find that to be the case. (R. 1788–1791.)

There is no basis whatever for the contention that the evidence at the suppression hearing showed Lubben to be a perjurer. Huebner testified in detail at the supplemental hearing concerning 17 separate cash payments which he recalled receiving from Lubben or Lubben's agents. Those payments totaled about $300,000 of which only $28,000 was received in 1944, and the remaining $272,000 in 1945 and 1946. All of the $300,000 was divided among Cain, Huebner and Sullivan. Huebner was not asked at the hearing, and did not indicate, whether the 17 payments he specifically identified were the *only* ones he had received. In any case, Huebner was not the only recipient of Lubben's cash. Other payments from Lubben were received by Roeser, Graflund and Mrs. Morrill, placed in a "corn box" or a safe deposit box, and, for the most part, expended for raw corn. How much money these three received is undetermined, since records relating to those receipts were destroyed upon Cain's instructions. At the trial, however,

Graflund estimated the amount at $80,000. (R. 1747-1748.). At the Belden-Stratford Hotel meeting in July 1948, the company officials estimated that about $125,000 in currency had been disbursed for corn. (App. 1065-1066.) And in his argument to the court following the supplemental suppression hearing, counsel for petitioners stated that the money which Shotwell received and which went into the "corn box" was (App. 1681) "a figure of one hundred and twenty-five to one hundred and fifty thousand dollars—whatever you want to name it—no one can say with precise precision." (App. 1676-1681.) If the $272,000 received by Huebner in 1945 and 1946 and pocketed by the defendants is added to the $125,000-$150,000 which found its way into the "corn box," the total is not far removed from the $454,000 which Lubben claimed he had paid. Thus, the record of the supplemental hearing does not discredit, but, on the contrary, powerfully corroborates Lubben's testimony.

Huebner may have contradicted Lubben on certain details, but even as to them the conflict was not as sharp as petitioners portray it. Petitioners allege (Br. 51, 85) that Huebner, contrary to Lubben's testimony, denied at the hearing that Lubben had paid overages of $40,000 in connection with the sale of chocolate-covered nuts. Examination of their record reference (App. 797-800) indicates, however, that Huebner never actually responded to the question about chocolate-covered nuts. Petitioners also allege (*id.*) that Huebner testified Lubben lied concerning an item of $49,000 paid to Graflund. Actually, Huebner's testimony (App. 809) was that he "thought it

was a mistake on Lubben's part." Asked on cross-examination how many times he had told Cain's counsel that Lubben was a liar, Huebner replied (App. 809), "I thought he lied on the stand here," but petitioners failed to elicit any particular in which Huebner thought Lubben had committed perjury.

Similarly, petitioners claim (Br. 22, fn. 14, 85) it was established at the supplemental hearing that Lubben's records had been altered by Tobias to show as charges against Shotwell items that had been paid to other companies.[56] The only basis petitioners have for this allegation is Huebner's testimony that Tobias, upon meeting with Cain, Sullivan and Huebner in New York in June 1948, reportedly told them that he was working for Internal Revenue, that he had worked for Lubben, that he had helped Lubben alter the latter's books to charge over-ceiling payments to Shotwell, that he could keep petitioners informed as to what was going on in Internal Revenue, and that he wanted to be paid by Cain. (App. 655–656, 969.) The testimony of Huebner concerning Tobias' statements was nothing new, for Cain and Sullivan had given similar testimony at the trial.[57] (R. 2556–2557, 2678–2679.) This hearsay testimony as to what Tobias said falls far short of establishing (Pet. Br. 85) "without contradiction * * * that Lubben's purported records

[56] Petitioners also assert (Br. 85) that Tobias was a Treasury employee and was on the Treasury payroll. This allegation is not true.

[57] Cain testified that he asked Tobias to get evidence of the alleged alteration of Lubben's books and that he agreed to pay Tobias for the information. (R. 2556–2557.) Cain had Pat Grace pay $500 to Tobias. (R. 2085–2086, 2614–2615.)

which went to the jury had been 'doctored' (App. 969) by one Tobias."

We submit that petitioners have failed utterly to show Lubben's books or testimony to be false or perjurious and that the misstatements at the trial, as both the jury and Judge Nordbye found, were made by Cain and Sullivan, not by Lubben.

C. The evidence at the trial shows that it was Cain, not Lubben, who seriously misstated the amounts paid by Lubben

As we have shown in our Statement, *supra*, pp. 18–22, there was a sharp conflict between the trial testimony of Cain and that of Lubben as to the amounts of black market overages paid to Shotwell by Lubben and his associates. There is no need to repeat here the mass of evidence adduced by the government in support of the verdicts of guilty (*supra*, pp. 18–23). In view of its importance on the question of Lubben's alleged "perjury," however, as well as its bearing on the suppression issue, we shall discuss briefly certain details of the proof which show—conclusively, we believe—that it was Cain rather than Lubben who departed substantially from the facts.

It will be recalled that petitioners' defense at the trial (and, indeed, ever since) [58] was that Lubben had paid Shotwell cash overages for the purchase of black market corn, and that since there was no unreported income, and no tax deficiency owed by the corporation for either 1945 or 1946, petitioners could not have been

[58] See, *e.g.*, Br. 9–10, 22–24, 37, 51–52; App. 750, 953–954; Brief in Opposition to Certiorari (pp. 5–6) filed by the present petitioners in *United States* v. *The Shotwell Mfg. Co., et al.*, No. 470, Oct. Term, 1955.

guilty of wilfully attempting to evade the corporate taxes for those years. Cf. *Lawn* v. *United States*, 355 U.S. 339, 361. Cain testified that Lubben lied when he said the payment of cash overages had begun in 1944. Cain swore that in fact they had not begun until some time after September 29, 1945; that on that date Lubben agreed to pay 3 cents per pound in cash over the invoice price on "gum work"; and that Shotwell had increased this rate to 5 cents per pound in February 1946, and to 10 cents per pound in June 1946. (R. 2546–2549, 2572, 2575.)

At the time Cain gave this testimony, there was already in evidence (to take one example) a group of nine Shotwell invoices dated between December 6, 1944 and January 13, 1945, a recapitulation sheet prepared by Miss Feldman, and a check payable to cash—signed by Lubben, dated January 19, 1945, and cashed on that date—in the amount of $10,849. The nine Shotwell invoices billed Lubben for a total of 188,490 pounds of "gum work" (*i.e.*, gum drops and spice buttons—Govt. Ex. 27A, Ex. Vol. I, p. 21) and the recapitulation sheet (*id.*) showed an advance payment of $8,000. If, as Lubben testified, the rate of overage on "gum work" was 10 cents per pound from the very beginning, then the $8,000 advance had already paid for the overages on 80,000 pounds, and left Lubben still owing, as of January 19, 1945, $10,849 for the remaining 108,490 pounds billed by Shotwell. The check drawn to cash, and actually cashed on January 19, 1945 (R. 1443–1444, 1452–1453), was in the exact amount of $10,849, which ties in precisely with the 10-cent rate Lubben said was in effect in January 1945, and which Cain said (R.

2575) did not go into effect until June 1946 (Govt. Ex. 25A and 27A, Ex. Vol. I, pp. 20-21; R. 1427, 1430, 1434-1435, 1439-1441, 1443-1444, 1452-1453).

Similarly, on February 6, 1945, Lubben wrote a check to cash in the amount of $6,183, and it was cashed on that date. (Govt. Ex. 28, Ex. Vol. I, p. 23; R. 1439-1442.) This represented overages due to Shotwell on four Shotwell invoices billing Lubben for a total of 61,830 pounds of "gum work." (R. 1435, 1438-1442.) Again, here is solid proof that as early as February 1945, Shotwell was exacting cash black market premiums from Lubben, and at the rate of 10 cents per pound.[*] (Examples could be multiplied—see the prosecutor's summation to the jury, R. 2857-2858, 2863-2874—but we see no need for it.) We submit that these checks drawn to cash sweep away all the empty talk in petitioners' brief and in the defense summations to the jury (R. 2882-2896, 2898-2911, 2914-2918) to the effect that Lubben and his corroborating witnesses were lying, and that his books showing cash overages to Shotwell, were falsified. By the same token, Cain could not have been telling the truth when he testified (contrary to overwhelming evidence already in the record) that Shotwell had had no black market dealings with Lubben until after September 29, 1945, and that Shotwell had not increased the overage rate

[*] We note that in cross-examining Miss Feldmair, who testified in detail to these transactions, defense counsel carefully avoided discussing these checks payable to cash, except to bring out that the government had been unable to produce "cash authorization slips" from Lubben for these items (R. 1589-1591). This is a matter of no consequence, since Lubben undoubtedly signed the checks.

on "gum work" to 10 cents per pound until June 1946. (*Supra*, p. 80.) Cain was unable to explain, under cross-examination at the trial, how Lubben, early in 1945, happened to be drawing checks to cash in an amount equal to 10 cents for every pound billed to him on Shotwell invoices [80] when, according to Cain, the 10-cent overages were initiated by Shotwell only in June 1946. Defense counsel did not even attempt an explanation to the jury. It remains unexplained to this day, except on the theory, plainly adopted by the court and jury below, that the misstatements were not by Lubben but by Cain.[81]

III. Petitioners' allegations of fraud and impropriety on the part of the government are wholly unwarranted

Petitioners accuse the government of abusing the processes of law enforcement in several respects. The conclusion they draw from the supplemental hearing

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[80] Q. Well, Mr. Cain, how do you account for the fact that as early as 1944, and certainly as early as January, 1945, Mr. Lubben on the invoices he received from The Shotwell Manufacturing Company was marking a ten cent over-ceiling and was drawing checks to cash and was showing them on his records as drawn for the purpose of paying The Shotwell Manufacturing Company?

A. If you can tell me that, you are a better man that I am. (R. 2572.)

[81] The cases of *Mesarosh* v. *United States*, 352 U.S. 1 and *Communist Party* v. *Control Board*, 351 U.S. 115 (relied upon by petitioners—Br. 87-89) are plainly inapposite because in those cases it appeared after the trials in question that the testimony of government witnesses was substantially untrue. In the case at bar it is clear that, whatever Lubben's pre-trial sins may have been, his testimony was substantially true.

We have answered the contention (Br. 85) that Lubben's books had been "doctored" by one Tobias at pp. 78–79 and fn. 56, *supra*.

is not that fraud permeated the showing made by them, as both courts below have found, but, rather, that the remand order issued by this Court was improperly induced by the United States. Petitioners further allege that the government concealed from this Court certain prior inconsistent statements which tended to reflect adversely upon the credibility of the witnesses whose testimony it promised to produce. Finally, they suggest that the government, while prevailing upon this Court to hold the case in abeyance, harrassed witnesses until, either through fear or favor, they recanted the truth and told lies.

A. The trial court's findings support the government's contention that petitioners' showing was permeated by fraud, and do not bear out petitioners' contention that there was falsity in the government's representations to this Court

In its opinion remanding the case for supplemental proceedings, this Court stated "that either the testimony in the District Court was untrue or these affidavits themselves are the product of fraud" (355 U.S. 242–243). This issue has been resolved against petitioners, albeit their brief would suggest to the casual reader that somehow it was the government which was found lacking in good faith.

To answer petitioners' charges with particularity, it becomes necessary to summarize in some detail the series of representations which the government made or sponsored in urging this Court to remand the case for further proceedings.

The motion to remand, originally filed in October 1956 and amended a month later, advised the Court that an investigation launched by the national office

of the Internal Revenue Service in April 1955 had brought to light new evidence relevant to the question of the timeliness of the purported voluntary disclosure. The government expressed the view that this evidence, if it could be made available to the district court, would support findings that the petitioners did not attempt to make a voluntary disclosure until July 1948 (subsequent to Special Agent Krane's visit) and that Busby's figures were prepared during the space of a single day in the month of July, rather than over a period of several months beginning in January (as Busby had testified).

In support of these representations, the government relied principally upon two affidavits, one by James Yaden, an Internal Revenue inspector, and the other by Vincent P. Russo, an attorney assigned to handle a grand jury investigation initiated by the Justice Department in April 1956. According to Yaden's affidavit, dated December 1, 1955, witnesses interviewed by him in October and November 1955 stated that when Krane visited the Shotwell plant on June 21, 1948, Graflund telephoned Cain in New York to advise him that a special agent had requested certain documents relative to transactions with David Lubben; that Cain was shocked and disturbed to learn of this request; and that, upon terminating the long-distance conversation, Cain turned to his associates and condemned Graflund for having given Krane the documents. Yaden was further informed that in July 1948 a meeting was held in the Belden-Stratford Hotel for the express purpose of preparing the figures and documents from which there could be de-

veloped a voluntary disclosure of Shotwell's unreported receipts. Although Yaden's informants were not identified by name in the affidavit, it was in fact Graflund who related his telephone call to Cain and the Belden-Stratford meeting, and one Daniel Tobias who described Cain's reaction after receiving the call in New York.[82] Graflund's account of these events, as repeated at the supplemental hearing, was accepted by Judge Nordbye as accurate, and although Tobias was never called as a witness, his description of Cain's reaction to the phone call was substantiated at the hearing by the testimony of Huebner.[83]

Russo's affidavit, dated September 19, 1956, was based upon information obtained through interviews with several witnesses during the course of his grand jury investigation. Although not identified in the affidavit, Graflund and Huebner were among the witnesses interrogated by Russo. In addition to the two episodes already related in Yaden's affidavit, Russo disclosed that one Edward T. Urban, an officer of Close & Co., a candy manufacturer which also received black market payments from Lubben, informed him that in July 1948, at Huebner's invitation, Urban had lunched with Sullivan and Huebner at the Chicago

[82] Tobias told Yaden he was meeting with Cain, Sullivan, and Huebner in Cain's Waldorf Astoria Hotel suite when the call from Graflund came through. Heubner later testified that the Shotwell people met with Tobias in Cain's suite on June 22, the day *after* Graflund's call (App. 655-656.)

[83] However, while Tobias had mentioned Huebner as one of those present when Graflund's call was received, Huebner testified merely that Cain angrily told him about the call later the same day (App. 651).

Athletic Club, and that they discussed the purchase of Lubben's companies by Shotwell, Close & Co., and others who received over-ceiling payments from Lubben, with a view to acquiring and destroying the books and records of the Lubben companies and thus removing incriminating evidence."[64] Finally, Russo's affidavit reported certain information given him by Ralph Johnson, group supervisor in the Revenue Agent's office in Chicago. Sauber had testified at the original suppression hearing that, after his initial contact with Busby on March 15, 1948, he had immediately informed Johnson by telephone. Johnson, on the other hand, denied to Russo that he had received such a telephone call from Sauber in either March or April 1948, but stated that he did receive such a call some time before July 21, 1948, perhaps in May or June.[65]

In a supplement to its motion, filed in January 1957, the government advised the Court that upon remand Huebner's testimony, as summarized in an attached affidavit, would contradict the testimony given by Cain, Sullivan, and Busby on several crucial points. Among other things, Huebner's affidavit, executed on December 19, 1956, stated that the black market payments from Lubben extended over the period from November 1944 to December 1946, not

[64] Urban was unable to testify at the supplemental suppression hearing, as he was then hospitalized for treatment of an acute cerebral hemorrhage. (App. 1190.)

[65] Johnson's testimony was unavailable to the government at the supplemental hearing, as he was then under indictment for conspiracy to commit various offenses in connection with the case. (See S. 1–28.)

merely from September 1945 until the summer of 1946, as the defendants had testified. Huebner further stated that he, Cain, Busby, and others reconstructed the over-ceiling receipts from Lubben at a meeting at the Belden-Stratford Hotel in July 1948; that the purpose of the meeting, according to Cain, was to prepare figures for a disclosure to the Internal Revenue Service; that the over-ceiling disbursement figures prepared by Cain "were taken out of thin air"; that Huebner was given to understand that the agreed-upon date of the disclosure would be June 15, 1958; that, prior to this meeting, he knew of no work done by anyone relative to compiling data for a voluntary disclosure; and that at no time during the first six months of 1948 did Cain or Sullivan mention to Huebner that a voluntary disclosure had been made or was contemplated. In addition, Huebner, corroborating Ed Urban's disclosure to Russo, declared that he had arranged a meeting in July 1948 at the Chicago Athletic Club, at which Urban and Sullivan had discussed the possibility of buying Lubben out to obtain his records. The affidavit also related that in July and August 1948, at Cain's request, Huebner delivered to Cain $10,000 to "fix" the tax case; that Cain later told him the money had been turned over to someone to take care of a "tax fix" and that he had settled the tax case for a deficiency of $20,000; and that in October 1948 Busby told him there had been a meeting in the fraud division of the Internal Revenue office, that "hell had broken loose," and that some Internal Revenue people had a "heck of a time destroying papers that had been

made up for the purpose of billing Shotwell for taxes." Finally, Huebner declared that, after hearing Sauber testify at the original suppression hearing in 1952, he told Cain he thought the disclosure date was supposed to be June 15, 1948, whereupon Cain told him to "Ssshhh," since nobody else knew about that. On the basis of this affidavit, as well as the new evidence previously presented, the government urged a remand to the district court, since the record clearly appeared to contain perjured testimony and to be incomplete and inaccurate on the timeliness, extent, and good faith of the alleged voluntary disclosure.

On February 25, 1957, this Court granted the government's petition for certiorari, limited to the issues raised in the amended motion to remand, the supplement thereto and the petitioners' answer to the amended motion (352 U.S. 997).

On August 20, 1957, the government filed with the Court an affidavit of Graflund which had been executed on August 17, 1957. Much of Graflund's affidavit paralleled Huebner's. Graflund confirmed that the figures as to the amount of the cash receipts from Lubben were prepared at the Belden-Stratford meeting, called by Cain in July 1948 and attended by Cain, Busby, Huebner, and himself; that prior to this meeting he knew of no work done by anyone to assemble records or data for the purpose of preparing a voluntary disclosure to the government and had no information that any such disclosure to the government had been or was to be made; that, in the latter part of July 1948, Cain said he could settle the

Shotwell tax matter for about $20,000; and that, early in August, Cain reported that he had settled the case for a $20,000 deficiency. Graflund repeated his statement that on June 21, 1948, he was criticized over the telephone by Cain and Sullivan for having made certain records available to Special Agent Krane. He further stated that, a few days later, he visited Busby's home; that he then told Busby, for the first time, what he knew about the black market receipts; and that Busby gave no indication he had known of this matter previously. Finally, Graflund revealed that in 1949, acting on Cain's instructions not to have anything of an incriminating nature around the Shotwell office, he caused the destruction of certain cost records; and that, also in 1949, Sullivan told him, if questioned by the investigating revenue agent, to tell the agent he didn't know a thing.

In its brief, filed in August 1957 shortly after the filing of Graflund's affidavit, the government summarized (pp. 25–30) the newly discovered evidence relevant to the issues of timeliness and good faith. In addition to matters set forth in the affidavits of Huebner and Graflund, the brief declared (p. 29) that Huebner would testify that between $300,000 and $400,000 of Shotwell's black market receipts from Lubben were not paid out for the purchase of raw materials on the black market but, instead, were divided among Cain, Sullivan and himself. It also stated (p. 30) that Revenue Agent Lima would testify that, on July 30, 1948, he was assigned to audit the corporation's tax return; that he commenced the

audit the first week of August 1948; that he was instructed by Johnson, his group supervisor, to allow the over-ceiling purchases indicated on Busby's summary; and that he prepared a report showing a tax deficiency of about $20,000, which report he later destroyed on instructions of Johnson. The government expressed the view (p. 25) that the new evidence summarized in the brief would support the charge that perjured testimony with reference to the so-called disclosure had been given by petitioners Cain and Sullivan. This evidence, it was argued (p. 25), indicated the petitioners had made no move to disclose the corporation's unreported black market receipts prior to Special Agent Krane's visit on June 21, 1948; and showed conclusively that the alleged disclosure "was not only devoid of good faith and incomplete but was designed to mislead the Government and conceal the true facts."

If one considers the record and findings at the supplemental suppression hearing in the light of the above representations made to this Court, two salient facts emerge. *First*, the government's three principal witnesses—Graflund, Huebner, and Lima—gave precisely the testimony which, this Court was advised, the government anticipated. *Second*, of all the items of testimony foreshadowed in the briefs and affidavits the government submitted to this Court, only a single item was found by Judge Nordbye to be inaccurate. The exception was Graflund's statement that he first told Busby about the black market receipts in June 1948, rather than in January. The court found (Pet. 43) that "it is very probable that Graflund did men-

tion to Busby something about the black-market payments of Lubben to Shotwell when they were on the train together in January, 1948." The court further found, however, that Grathund discussed the matter with Busby on both occasions; that Grathund testified "in good-faith" that the first disclosure to Busby was in June 1948; and that the "apparent falsity" of Busby's statement that he first contacted Sauber in January 1948 "may well have caused Grathund to question the train episode as related by Busby." (App. 1759–1760; Pet. 42–43.)

With that one exception, every statement contained in Grathund's affidavit, and every statement contained in Huebner's affidavit, if mentioned at all in Judge Nordbye's [86] order, was found to be the truth. The court also believed Lima's testimony. Although the court deemed it improbable that Lima's report was to be the final adjudication of Shotwell's tax obligations, it found that Lima had taken preliminary steps to prepare a report [87] which had for its purpose the

[86] The court made no reference to the meeting at the Chicago Athletic Club between Huebner, Sullivan, and Ed O'Brian.

[87] During the period in question, a "revenue agent's report" consisted of two parts: (i) a transmittal letter, the confidential portion of the report which the taxpayer does not receive; and (ii) a preliminary "Statement of Total Tax Liability," which sets forth the computation of the tax liability, the taxes paid, and any deficiency or over-assessment (See App. 1358). The transmittal letter, in turn, consisted of a summary of the taxpayer's deficiencies or over-assessments for the years in question; several more or less formal questions; and, finally, an item called "other information", in which any unusual features of the taxpayer's situation were to be described. Questioned by government attorneys on December 19, 1956, Lima stated he had written out "a report, everything but the transmittal

settlement of Shotwell's tax deficiency in the amount of $20,000 (App. 1768; and see Pet. Br., 24–25). The court also found (App. 1768) that Lima's testimony about destruction of the report tied in with Huebner's (and Graflund's) testimony that Busby said there had been a meeting in the fraud division of the Internal Revenue office about the Shotwell taxes, that papers were being destroyed and that "all hell had broken loose"; and the court noted that the evidence in this regard "strongly tends to illustrate the connivance and lack of good faith in the so-called bona fide voluntary disclosure of Shotwell's tax deficiency."

Petitioners' charges (Br. 15 and fn. 10, 53–55, 76–78, 80–84) that Huebner and Graflund committed perjury, both in their testimony and in their affidavits to this Court, and that government representatives in effect suborned perjury, were presented in detail to the district court (see the petitioners' argument to

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letter" and "submitted the report to Mr. Johnson for his approval" (App. 1473). In testimony before the grand jury in February 1957, Lima elaborated on his December statement, explaining that the only part of the transmittal letter he did not fill in was the part called "other information," though as he later admitted that was the "guts" of the document (App. 1505). On direct examination at the supplemental hearing, he declared merely that he had "prepared a report" (App. 1357–1358), attempting to point out on cross-examination that the only part of the transmittal letter he did not complete was the section "other information" (App. 1474). Whether, in completing the "Statement of Total Tax Liability" and the formal parts of the transmittal letter, Lima could be said to have "prepared a report," prepared part of a report, or as the court put it, taken "some preliminary steps" to prepare a report (App. 1768), is a matter of terminology upon which nothing whatever turns.

the court." App. 1676 (1742). The court found not only that the charges were baseless, but that, on the contrary, fraud permeated the showing made by these petitioners at the original suppression hearing, as well as at the trial and the supplemental hearing. (App. 1770, Pet. 53-54.) In his opinion and order, Judge Nordbye stated that he did not believe any government official had attempted to have any witness testify falsely; that there was no foundation for the suggestion the government witnesses were trying to "frame" petitioners; that Huebner was trying to the best of his ability to tell the full story; and that Grathund was attempting to tell the truth as he remembered the events." (App. 1769–1770.)

Furthermore, notwithstanding the sweeping assertions to the contrary in petitioners' brief (pp. 5, 53, 62, 80), Judge Nordbye *did* find that Cain, Busby and Sauber had testified falsely in many respects as to the time and the manner of the alleged voluntary disclosure. He specifically found, for example (App. 1764–1765), that Busby and Cain did *not* contact Sauber in January 1948, as they had testified, nor on March 15, 1948, as Sauber had testified, but rather that "it was much later [than March 15, 1948] when

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[65] Statements of the witnesses at the supplemental hearing, memoranda of conversations with them, and grand jury transcripts were turned over to petitioners for purposes of cross-examination. After both sides had rested, the government, pursuant to an inquiry by the court, offered to turn all these documents over to Judge Nordbye to aid him in determining whether the testimony of the witnesses was inconsistent. It is noteworthy that counsel for petitioners objected and for that reason the statements were not received by the court. (App. 1638–1642, 1748–1749.)

Sauber was informed that Shotwell was the offending taxpayer."* He also found that "the circumstances disclosed by the evidence convincingly indicate that Busby is wrong when he states that he and the Shotwell employees were working on figures for a voluntary disclosure from January 1948 to June 1948" (App. 1760, Pet. 44). And, of course, the court found that petitioners were lying throughout when they denied that they had pocketed substantial amounts of black market cash from Lubben (App. 1758-1765, Pet. 41-48).

The court of appeals, upon its review of the record, observed that "[t]he district court on remand clearly considered relevant testimony of the defendants untrue and in effect absolved the affidavits of Huebner and Gratlund of the charge of fraud." (S. 296; Pet. 60.)

We add one final comment. The then Solicitor General would not have authorized the submission of affidavits if he had any doubt whatever of their pro-

*Judge Nordbye's finding (App. 1761) that Busby did visit Sauber some time before June 21, 1948 was based upon the testimony of Edmund B. Horgan, a retired Internal Revenue Service employee, who related an alleged occurrence about which the government had no prior information. Horgan, a friend of both Sullivan and Sauber, testified that he saw Sullivan in a hospital on June 4, 1948; that Sullivan asked if Sauber was "a tough Government man" or "a fair individual"; that Sullivan said his company had been to Internal Revenue and he had not heard anything about it; and that Sullivan wanted to know if Horgan could give him an answer. From his hospital room, Horgan allegedly talked by telephone to Sauber, informed Sauber of Sullivan's inquiry, and was told that Sauber had reported the case to the agents' office and in due time they would get around to it. (App. 1560-1601.)

bity. Subsequent events in nowise suggest that he was either misled or mistaken.

B. The government discharged its duty to disclose the nature of the newly discovered evidence which it proposed to offer in the District Court. It had no obligation, at that stage, to deal with questions of credibility which could only be resolved at an evidentiary hearing

Petitioners accuse the government of concealing from this Court the following facts: (i) that Graflund, at times prior to execution of his affidavit, had told government investigatory personnel, and also the grand jury, that he had first disclosed the black market transactions to Busby on the train in January 1948 (Pet. Br. 29–34, 81–82); (ii) that Huebner, prior to executing his affidavit on December 19, 1956, did not recall having attended a meeting with Sullivan and Ed Urban at the Chicago Athletic Club for the purpose of discussing a buy-out of Lubben's companies (Pet. Br. 38–39); and, (iii) that Lima, prior to December 1956, had testified as a government witness at the original suppression hearing and at the trial, and had been questioned by government investigators, without saying anything about the preparation of a revenue agent's report (Pet. Br. 34–35).

Citing *United States* v. *Zborowski*, 271 F. 2d 661, 668 (C.A. 2d), and other authorities dealing with the duty of a prosecutor to disclose exculpatory evidence, petitioners urge that there was impropriety in failing to bring this prior inconsistent testimony to the Court's attention. These cases have no relevancy whatever. Plainly, the then Solicitor General was not asking this Court to resolve the factual issues raised by its new evidence or to pass judgment upon the credi-

bility of the witnesses. Although the government was, indeed, convinced that the affidavits presented were truthful and that the record below was tainted by perjured testimony, it did not ask this Court to take any action which required it to endorse these views. On the contrary, the supplement to the motion to remand (pp. 5-6) took pains to point out that "[n]either this Court nor the Court of Appeals is properly equipped for the task of receiving and appraising testimony and evidence bearing on the controverted questions of fact," and that "[a]scertainment of where the whole truth lies with respect to the alleged disclosure is a function . . . for the trial court in the first instance." The purpose of the motion to remand was simply to bring to the Court's attention new evidence which—if believed by the trial court after being exposed to cross-examination and rebuttal in *that* forum—would support (or reinforce) findings that the purported voluntary disclosure had been untimely and/or devoid of good faith.

We note, moreover, that even if this Court *had* been disposed to weigh the credibility of the government's proposed testimony—a fanciful premise—it would not have been greatly assisted by a bare concession that this testimony would in certain respects deviate from previous testimony of the witnesses. A determination of a witness's credibility requires the fullest exploration of details and an appreciation of every nuance in his story. Huebner, for example, was reminded of the meeting with Ed Urban at the Chicago Athletic Club by talking to Urban himself, who recalled the incident

in vivid detail (App. 970).[70] Gratlund, in explaining why he repudiated his original testimony concerning his conversation with Busby on the train in January 1948, told the trial court at the supplemental hearing that, in fact, he had been drinking during that conversation and was unsure what had been said; that he accepted at face value, and thereafter repeated, what Busby told him had taken place on the train; and that it was only when he recalled his visit to Busby's house in June 1948 that he was moved to go back to the grand jury (on February 20, 1957) and correct his prior testimony (App. 1202–1204). At the supplemental hearing Lima frankly acknowledged that he had previously lied about the revenue agent's report; that he realized he had acted improperly in following Johnson's instructions to prepare, and subsequently destroy, the report; and that he was afraid if the truth were discovered he would get into trouble and lose his job. (App. 1368, 1503, 1523–1525, 1529–1534.) The plausibility of these explanations would have had to be determined by this Court in the light of the entire record, including that portion of the affidavit testimony which was *not* inconsistent with prior statements, and even then it could not have been satisfactorily decided in the absence of an opportunity to observe the demeanor of the witnesses.

The propriety of the conduct of government counsel the first time the case was here becomes still clearer

[70] Urban recalled, for example, that Sullivan had pointed out Chicago's Mayor Kennelly at a nearby table. This reminiscence is not in the record, but is preserved in the memorandum of Urban's interview by government investigators in September, 1956.

when the alternative is considered. Counsel believed that the affiants would testify in accordance with the affidavits and that their statements were honest. Counsel also believed that the affiants' stories corresponded substantially with the true facts and would be credited by the judge at the proposed hearing. In addition, counsel knew or had information from which they could know that the affiants might be impeached either because of their prior contradictory statements or their earlier failure to include in their account of the events the facts to which they now proposed to testify. The very most that counsel could have done under these circumstances would have been to inform the Court that the witnesses probably would be attacked upon the latter grounds but that they, as government counsel, fully believed the truth of the affidavits and were confident that the district court would agree. We agree that the government has an obligation to volunteer all relevant information and must err on the side of excessive candor, but the obligation is to help the Court administer justice. Counsel should have asked—and perhaps did ask—themselves whether adding the foregoing statements would be of any possible assistance to the Court. Plainly, it had no logical relevance. The Court was not being asked to pass, and could not pass, upon any question of credibility. Nor would it color the record to such an extent that one might imagine its influencing the decision psychologically. In short, while counsel with unusual foresight and cynicism might think it wise to make the disclosure in order to protect themselves against unjustified criticism, the test

of helpfulness to the Court certainly did not require them to bring forward the possible weaknesses in the newly discovered evidence. Indeed, disclosure would have opened up more questions than it solved. If counsel mentioned these "weaknesses" in the newly discovered evidence, would they not be guilty of half-truths if they failed to explain everything else that might be said against it? And they would then be warranted in describing all the corroborative information. Manifestly, all this would be quite collateral because the veracity of the projected testimony was not then in issue. Furthermore, even if it be supposed that counsel erred in failing to refer to the impeaching material, the worst that can be said is that they committed an error of judgment while acting in good faith. Such a mistake, even if it occurred, would not vitiate the careful findings of the district court made after a full review of all the relevant evidence.

Once the suppression hearing had commenced, the government, contrary to petitioners' allegation, was entirely cooperative in making available to petitioners all of the prior statements and grand jury testimony of its witnesses (App. 554–556, 891, 994–986, 1191, 987–989, 1369–1373). Indeed, in Lima's case, the government turned its statements and memoranda over to opposing counsel a week before the witness took the stand (App. 987–989). We might note,

[7] It is true, as petitioners point out (Br. 78), that the government did not volunteer the statements *prior* to the hearing (App. 297). Under 18 U.S.C., Section 3500, however, it is contemplated that production of such statements will take place only after the witness has testified on direct examination.

moreover, that after both sides had rested, the government, in response to an inquiry by the court, offered to furnish all prior statements of its witnesses to Judge Nordbye for whatever illumination they might throw upon the case. Counsel for petitioners, however, having used the statements for purposes of cross-examination, objected to their further use, and for that reason the court declined to receive them. (App. 1638–1642, 1748–1749.) In his order, Judge Nordbye commented that "[t]he forthright attitude of government counsel to submit all prior statements and Grand Jury testimony of Huebner and Graflund to defendants' counsel indicates a commendable frankness in affording the Court all of the background which may bear upon their veracity" (App. 1770, Pet. 53).

The government is keenly aware of the exacting obligation of candor it owes this Court. When it sponsors affidavits—even, as here, for the limited purpose of showing that the record below needs to be amplified—the Court has a right to assume that these affidavits have not been improperly obtained; that, so far as the government knows, they honestly reflect the affiants' best current recollection of the events described; and that the government is not withholding other new evidence which discredits or substantially outweighs the evidence it exhibits to the Court. Beyond that, the Court is entitled to assume that the government itself is convinced that its witnesses are telling the truth. We do not believe, however, that it was incumbent upon the government, in seeking a remand, to anticipate for the Court every circum-

stance which might be relevant in assessing the credibility of the testimony proposed to be adduced. The government made no pretense that the testimony which would be given by its witnesses, and which was outlined in their affidavits, would correspond in all respects to their original, unrefreshed recollections of the events in question, all of which had taken place at least eight, and in some instances as many as twelve years earlier.

In the case of Lima, it was apparent on the face of the record before this Court that his self-incriminating admission of having prepared and later destroyed a revenue agent's report, showing only $20,000 of taxes due from Shotwell, was a sharp departure from previous testimony, for, as noted earlier, Lima had appeared as a government witness both at the original suppression hearing (R. 319 *et seq.*) and at the jury trial R. 2804, *et seq.*) without so much as mentioning such a report.

Both Huebner and Grathund, as the Court knew, were officers of Shotwell. Huebner, though not a petitioner here, was a defendant in this case. Grathund, though not a defendant, was seriously implicated. Their belated offers to testify fully to the facts outlined in the relevant affidavits represented, on the face of it, a change of position. The reasons for this change, the way in which it occurred and the manner in which they recalled or reconstructed events and transactions long past were certainly matters which the petitioners were entitled to explore. Plainly, however, the inquiry was not initially one for this Court.

C. The charges of "undue pressure" are unsubstantiated and baseless

Petitioners would have the Court believe that the government obtained the testimony it wanted from Graflund and Huebner by a "brain washing" process in the course of which the witnesses were relentlessly questioned until they capitulated and told the desired story. The charge has no foundation.

The Court should bear in mind that in April 1956 a grand jury had been impanelled to inquire into all facets of the Shotwell income tax situation for the years 1944, 1945 and 1946, including the administrative handling of the original corporate tax case by the Internal Revenue Service, with a view to ascertaining whether and by whom any laws of the United States had been violated. With relatively brief interruptions, the grand jury was in continuous session from July through October 1956 and again during January and February 1957, returning, on February 27, an indictment against Sullivan, Cain, Busby, Sauber, and Johnson for conspiracy to defraud the United States and to evade income taxes.[72] More than 64 witnesses, including many Shotwell employees or former employees, appeared before the grand jury, and their testimony filled 77 volumes. As Attorney Russo and his colleagues progressed with their investigation,—

[72] The statement in petitioners brief that the 1957 indictment "did not charge that anyone had committed perjury with respect to the voluntary disclosure" (Appendix C, Br. xiv; Br. 47) is misleading. The indictment contains a number of counts alleging perjury on the part of Cain and Sullivan as to their dealings with Lubben in 1945 and 1946. These matters go to the very heart of the good faith of the alleged voluntary disclosure. (S. 17–25).

interviewing additional witnesses and combing a maze of documentary records, including bank records, pertaining to Shotwell's transactions—they inevitably found it necessary to recall Gratlund, Huebner, and other witnesses for further questioning in the light of new information which was unfolding. There is nothing in this record to suggest that the sessions at which Department of Justice attorneys and Internal Revenue personnel met with Gratlund and Huebner were characterized, at any point, by any intimation of coercion.[23] And we know of nothing outside the record to support the suggestion.

IV. The trial court properly denied petitioners' motions, filed more than four years after the verdicts, challenging the selection of the grand and petit juries

In July 1957, petitioners, alleging improprieties in the selection of the grand jury, moved for leave to withdraw their pleas of not guilty for the purpose of filing an amendment to their motion to dismiss the indictment. The motion was denied by District Judge Perry. (App. 3, 15–17; Pet. Br. 55–56.)

In March 1958, more than four years after the verdicts, petitioners, alleging newly discovered evidence, filed motions to amend their original motions to dismiss the indictment, in arrest of judgment, for judgment of acquittal notwithstanding the verdict, and for new trial. The moving papers (App. 111–115) alleged, in substance, that the grand and petit juries

[23] In the course of lengthy cross-examination, both men repeatedly denied (see, *e.g.*, App. 827–828, 915, 937–938, 1269–1270; cf. 1276) that they had been subjected to any form of pressure.

were illegally constituted and were selected through discriminatory and illegal practices by the Clerk of the District Court and the Jury Commissioner (including unlawful delegation of the powers of the Jury Commissioner). After a full hearing (App. 342–373), the motions were denied (App. 429–439).

In an extensive opinion (App. 429-439), Judge Noidbye noted that the motions represented petitioners' first challenge to the grand and petit jury arrays and held that any right to challenge the jury panels had been waived; that petitioners had failed to make any showing which would justify the court in granting relief from the waiver; that the juries in fact were not illegally constituted; and that there was no illegal delegation of duties of the Jury Commissioner.

Petitioners allege (Br. 90–107) that both the grand and petit juries were illegally selected because (1) the Jury Commissioner delegated his duties to one of his private employees; (2) volunteers were permitted to serve on the juries; and (3) the Clerk of the District Court used no method calculated to secure a cross-section of the population, but merely selected names from lists of private organizations and upon nominations of former jurors.

A. Petitioners' right to raise the point was waived by years of inaction

Petitioners plainly waived any right they may have had to question the method of choosing grand jurors. Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to

> show jurisdiction in the court or to charge an offense may be raised only by motion before trial. * * * Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. * * *

In *Scales* v. *United States*, 367 U.S. 203, 259, this Court held that such a waiver had taken place where the defendant, alleging that the grand jury was illegally impaneled, filed a pre-trial motion to dismiss the indictment subsequent to the deadline allowed by the court for the filing of motions. To similar effect are *United States* v. *Clancy*, 276 F. 2d 617, 631-632 (C.A. 7th), reversed on other grounds, 365 U.S. 312; *Miranda* v. *United States*, 255 F. 2d 9, 16 (C.A. 1st); *United States* v. *Silverman*, 129 F. Supp. 496, 513 (Conn.).

Similarly, a contention that a petit jury was not lawfully constituted, or that the jury panel was improperly selected, comes too late when made after the verdict. *Frazier* v. *United States*, 335 U.S. 497, 503; *United States* v. *Klock*, 210 F. 2d 217, 220 (C.A. 2d); *Haurattу* v. *United States*, 218 F. 2d 358, 359 (C.A. 5th), certiorari denied, 349 U.S. 928; *Higgins* v. *United States*, 160 F. 2d 222, 223 (C.A.D.C.), certiorari denied, 331 U.S. 822; *Zito* v. *United States*, 64 F. 2d 772, 773 (C.A. 7th); *United States* v. *Peterson*, 24 F. Supp. 470 (E.D. Pa.). Cf. *Batsell* v. *United States*, 217 F. 2d 257, 260 (C.A. 8th); *Gomez* v. *United States*, 245 F. 2d 344, 346 (C.A. 5th), certiorari denied, 355 U.S. 863. Petitioners' reliance upon *Ballard* v. *United States*, 329 U.S. 187, is misplaced,

for in that case the challenge to the jury panel was timely made and preserved, as was pointed out in *Wright* v. *United States*, 165 F. 2d 405, 407 (C.A. 8th).

As Judge Nordbye aptly observed, petitioners are attempting to challenge the jury panels in a collateral proceeding under the guise of newly discovered evidence (App. 432.) It has been held, however, that newly discovered evidence must be competent and relevant to the issues tried, and of such weight and nature that, if added to the evidence already in the case, it would probably change the result of the trial, and that a motion for new trial alleging illegal selection of the jury fails that test. *Tracy* v. *Terminal R. Ass'n. of St. Louis*, 170 F. 2d 635, 640–641 (C.A. 8th). Moreover, petitioners face the additional obstacle that whenever a new trial is sought on the basis of newly discovered evidence it must be shown that the evidence could not have been uncovered with due diligence at an earlier date.[7] There is no question that the Jury Commissioner, the Clerk of the Court, and those who assisted him were available for examination at all times. And, of course, the fact that some of the members of the panel were volunteers could readily have been ascertained at the time the jury was constituted.

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[7] *United States* v. *Allied Stevedoring Corp.*, 258 F. 2d 104, 105 (C.A. 2d), certiorari denied, 358 U.S. 841; *United States* v. *Costello*, 255 F. 2d 876, 880–881 (C.A. 2d), certiorari denied, 357 U.S. 937; *Mills* v. *United States*, 281 F. 2d 736, 738–739 (C.A. 4th); *Vaughn* v. *United States*, 93 F. 2d 550, 552 (C.A. 5th).

Although there may be circumstances in which it would be appropriate for the court to grant relief from the effects of a waiver such as this, petitioners have made no showing which would warrant such relief here. They do not contend that any irregularities in the selection process resulted in prejudice, nor do they show that the membership of the grand jury was unrepresentative of the community at large. And while petitioners claim that they were not aware of the alleged improprieties until shortly before they filed their motion, the court found that the method of selecting jurors in the Northern District of Illinois by Clerk and Jury Commissioner had been followed for years; that inquiry as to the system employed could have been made at any time; and that publicity as to the acceptance of volunteers had even appeared in the press (App. 432.)

Although it seems inescapably plain that petitioners have waived their right to raise the point, we shall nevertheless discuss the merits of their contentions concerning the selection of the jurors.

B. There was no illegal delegation of the duties of the Jury Commissioner

Petitioners assert (Br. 91–97) that the Jury Commissioner, the late Harry D. Crooks, abandoned and delegated the exercise of judgment as to the selection and rejection of prospective jurors to his employee, Richard Jongsma. They allude, in part, to the testimony of Crooks before Judge Barnes on June 28, 1957 (S. 226–245), in which he answered questions regard-

ing the manner of selecting names for the April 1956 Term Grand Jury, which in February 1957 indicted the individual petitioners and others in *United States v. Sullivan, et al.*, No. 57, CR 149 (Pet. Br. 47 and App. C, xiv).[13] Crooks acknowledged that he had Jongsma do a large part of the work of his office. But his testimony does not show that he had abandoned and delegated to Jongsma the selection of names from which were drawn the grand and petit jurors in the present case.

Jongsma, called as a witness for petitioners on April 21, 1958, gave the following testimony: For 23 years he had been employed by Crooks Terminal Warehouse and worked for its president, Harry D. Crooks. He did all the clerical work connected with Crooks' duty as Jury Commissioner. In connection with the selection of the names of certain members of the March 1952 Grand Jury, which returned the indictment in this case, and also of the petit jury which heard the case, Jongsma sent letters to various labor organizations, clubs, churches and church organizations in the Chicago area, the names of which were taken from the classified telephone directory. He also

[13] Crooks, who became Jury Commissioner on August 27, 1934, died in October 1957 (App. 317-318; S. 240.) In the course of proceedings held in this case on March 17, 1957 (App. 152), the record of the hearing before Judge Barnes on a motion attacking the constitution of the April 1956 Term Grand Jury in *United States v. Sullivan, et al.*, No. 57 CR 149, printed as an Appendix in Support of Petition for Writ of Mandamus filed in the Court of Appeals in *Sullivan, et al. v. United States District Court* (No. 12, 140), was by stipulation made a part of the record in the present case (App. 157, 312) and is referred to herein and in petitioners' brief as "S.".

selected names at random from telephone directories for inclusion in the list of persons to whom questionnaires would be sent. In addition, he sent questionnaires, along with a form letter signed by Crooks and stating qualifications for jury service, to all persons on the list of names compiled from organizations and telephone directories. When the questionnaires were returned, Jongsma checked them to see whether each individual met the statutory qualifications or came within the statutory exemptions shown on the reverse of the form letter. All of this was done under the supervision and direction of Crooks. When in doubt, Jongsma discussed certain questionnaires with Crooks, and it was the latter who made the decision as to which organizations to write to. Crooks told Jongsma to use the classified directory and send letters to all or virtually all the organizations listed under the headings of "clubs" and "churches," and Jongsma did so. (App. 315-362.)

The substance of Jongsma's testimony is that he acted in a ministerial or clerical capacity in carrying out instructions of his employer. Crooks did not delegate, nor Jongsma exercise, the ultimate responsibility for deciding from what sources the names of prospective jurors would be solicited. And there is no suggestion that Jongsma performed any discretionary function, such as selecting from the list of eligible prospective jurors, as disclosed by the questionnaires, the names which would be deposited in the jury wheel. All Jongsma did was read the questionnaires and eliminate those individuals whose responses showed that they did not meet the statutory requirements or that

they came within the statutory exemptions. This was a job which could just as well have been performed by an IBM machine.

Certainly, a public officer may delegate to an agent the execution of mechanical, clerical, or ministerial acts not involving judgment or discretion. Cf. *In re Giles*, 21 F. 2d 536, 537 (N.D. Ga); 67 C.J.S. Officers, Sections 104, 112, 114, particularly, Section 114. Official duty is ministerial when it is absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts, and the duty does not become discretionary in nature merely because those fixed and designated facts need to be ascertained. 43 Am. Jur., Public Officers, Section 258; *State ex rel. School Dist.* v. *Ellis*, 163 Neb. 86, 93, 77 N.W. 2d 809, 813. Since Jongsma acted in a ministerial capacity under the supervision and direction of Crooks, the work he performed did not involve any illegal delegation of the Jury Commissioner's duty of selecting names of prospective jurors.

The cases cited by petitioners are readily distinguishable. In *Glasser* v. *United States*, 315 U.S. 60, 85, this Court merely observed that the "duty of selection" by the Clerk of Court and a Jury Commissioner may not be delegated. In *United States* v. *Murphy*, 224 Fed. 554 (N.D.N.Y.), five-sixths of the names in the jury box came from a list which had been prepared for the Jury Commissioner by an Assistant United States Attorney—not entirely a disinterested party—who had drawn his list selectively from a larger list of all eligible jurors in the county. *In re Petition for Special Grand Jury*, 50 F. 2d 973 (M.D.

Pa.), the court rejected a citizens' petition to have a grand jury selected by certain private persons and organizations. In *Dunn* v. *United States*, 238 Fed. 508 (C.A. 5th), an unauthorized person performed all of the functions, discretionary as well as ministerial, of the clerk of court in selecting names for possible jury service.

C. The grand and petit juries were not illegally constituted because of the service of volunteers

The petitioners further challenge the grand and petit juries on the ground that "volunteers" were permitted to serve on both panels. They argue that volunteers were not competent as jurors under Illinois law and, therefore, under 28 U.S.C., Section 1861 (1952 ed.), then applicable, were not qualified for federal jury service. They also urge that, as a matter of policy, volunteers should be disqualified from serving on any federal jury.

According to petitioners (Br. App. D), 9, and possibly 10, of the 23 members of the Grand Jury,* were volunteers. That fact alone could not invalidate the indictment, even if volunteers should be deemed ineligible, for Rule 6(b) of the Rules of Criminal Procedure provides that an indictment shall not be dis-

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* The record discloses that five members of the Grand Jury (Karlson, Kruse, Delaney, Petersen, and Lundblom) definitely volunteered their services, three of them in response to a letter inviting volunteers for jury duty, written by Crooks and published in the *Chicago Tribune* (App. 321-326.) Three of the members (Underhill, Mohn, and Jachera) were *probably* volunteers (App. 417.) The record does not disclose that Schlichert, the ninth member identified by petitioners, was in fact a volunteer. Another juror, McDermott, was a "possible" volunteer (App. 147.)

missed on the ground that one or more members of the Grand Jury were not legally qualified if it appears from the record that 12 or more jurors, after deducting the number not qualified, concurred in finding the indictment. There is no evidence in the present record that, after deducting the volunteers, less than 12 jurors concurred in finding the indictment. And petitioners, upon whom, we submit, the burden rested, never asked the District Court, either in connection with the present motion or at any prior time, to ascertain the number of qualified jurors who supported the indictment.

The record shows that the only alleged volunteer on the petit jury (Ethel A. Gassen) called the Jury Commissioner by telephone in response to a letter he sent to various clubs, churches, and labor organizations (App. 329–330.) It is questionable whether a person who submits her name in response to a solicitation of the Jury Commissioner should be deemed a "volunteer." However, even if Mrs. Gassen were so considered, and even if it were assumed that volunteers were disqualified for jury service under Illinois law, her service would still not infect either the array or the petit jury. Thus, in *United States* v. *Smith*, 253 F. 2d 95, 97 (C.A. 7th), certiorari denied, 357 U.S. 919, a challenge to the petit jury array on the ground, among others, that it included volunteers was overruled by the trial court. In affirming this action, the court of appeals said:

> The evidence did show that names of volunteers were included. However, there was no

evidence that there were any volunteers on the panel summoned in this case. Even if there were it would not constitute a good ground for a challenge to the array because the entire panel would not be affected. Any legally disqualified juror on the panel could have been eliminated on a challenge for cause. There is no showing that any such challenge was made and overruled by the trial court.

We note, moreover, that while petitioners assert (Br. 97) that volunteers were incompetent under Illinois law, the statute they cite (Br. App. A, p. iii) appears to disqualify volunteers only in a case where a sheriff has been directed by the court to summon additional persons upon the exhaustion of the regular jury panel. We have found no decision by an Illinois court on the question whether volunteers are qualified for jury duty generally.

If volunteers are *not* incompetent to serve on juries under Illinois law, there is no authority for the proposition that they are incompetent under federal law. In *Dow v. Garnegie-Illinois Steel Corp.*, 224 F. 2d 414, 427 (C.A. 3d), certiorari denied, 350 U.S. 971, the court, while expressing disapproval of the volunteer method, nevertheless affirmed a judgment based upon the verdict of a jury consisting partly of volunteers on the ground that there was no evidence that persons had volunteered for improper purposes or that the acceptance of volunteers operated to exclude any cognizable group. Likewise, as Judge Nordbye emphasized in his opinion, there is no such evidence in this case.

D. The methods utilized by the Clerk of the District Court in selecting names of prospective jurors were permissible

Petitioners complain (Br. 100–103) that, according to an estimate of the Clerk of the District Court,[11] 70 to 75% of the names selected by the Clerk were drawn, directly or indirectly, from membership lists of private organizations. They allege (Br. 102) that this Court, in *Glasser* v. *United States*, 315 U.S. 60, "emphatically told all jury selection officials, and specifically those of the Northern District of Illinois, not to use such lists, and particularly not to use that of the Illinois League of Women Voters."

Petitioners misread the *Glasser* case. There, it was contended that an impartial trial had been denied because of the alleged exclusion from the petit jury panel of all women who were not members of the Illinois League of Women Voters. In its opinion (pp. 83–87), this Court did not broadly condemn the practice of utilizing membership lists of private organizations. Rather it condemned the exclusive reliance upon the membership of a single private association. Cf. *United States* v. *Dennis*, 183 F. 2d 201, 218 (C.A. 2d), affirmed, 341 U.S. 494, rehearing denied, 342 U.S. 842, 355 U.S. 936; *United States* v. *Flynn*, 216 F. 2d 354, 385 (C.A. 2d), certiorari denied, 348 U.S. 909; *Dow* v. *Carnegie-Illinois Steel Corp.*, *supra*, p. 427.

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[11] The Clerk testified that the figure "might" be as high as 70 to 75%, but that he "can't tell for sure." (S. 182.)

Petitioners also complain that the Clerk of the District Court utilized names submitted by former jurors. The use of such a sponsor system, however, is not unlawful. *Scales* v. *United States*, 260 F. 2d 24, 44–45 (C.A. 4th), affirmed, 367 U.S. 203, 259; *Dow* v. *Carnegie-Illinois Steel Corp.*, *supra*, at pp. 427–428 (in which names were solicited from former jurors); *United States* v. *Dennis*, *supra*, pp. 217–218; *United States* v. *Flynn*, *supra*, p. 385; *Walker* v. *United States*, 93 F. 2d 383, 390–391 (C.A. 8th), certiorari denied, 303 U.S. 644; *United States* v. *Brandt*, 139 F. Supp. 349, 360 (N.D. Ohio), reversed on other grounds, 256 F. 2d 79 (C.A. 6).

In this case the evidence shows that the names selected by the jury officials came from private organizations, telephone directories, nominations of postmasters in areas outside of Cook County, nominations of former jurors and other individuals, and also included volunteers. (S. 123–209; App. 315–357.) Similar methods of obtaining names of prospective jurors were sustained in *Dow* v. *Carnegie-Illinois Steel Corp.*, *supra*. Moreover, as the trial court found in its detailed opinion (App. 429–439), the methods used in the selection of jurors in this case did not result in the exclusion of any class or in the composition of juries which were not truly representative of a cross-section of the community.

V. There was no error in the instructions to the jury

The contention (Br. 108–110) that the court improperly permitted the jury to consider the disclosure

documents against Sullivan is frivolous. These exhibits (Govt. Exs. 185, 186, 189A–189E, Ex. Vol. I, pp. 116–117, 122–126) were, as we have said (*supra*, p. 53), admitted only against Cain and the corporation, and the jury was instructed that any "statement or act of one of the defendants not in the presence of another defendant is not binding upon the absent defendants" (R. 2970). If anything, this instruction was more favorable than petitioners deserved.[78] It would surely have been impracticable for Judge Nordbye, as he discussed the evidence in his final instructions, to have reminded the jury with respect to each bit of evidence mentioned that it had been admitted only against certain named defendants and should not be considered against the others. Moreover, Sullivan has no standing to object to the instruction now complained of because (1) his attorney, in summing up to

[78] Judge Nordbye—apparently out of an abundance of caution—frequently admonished the jury to that effect. But it is settled that the rule which imputes the acts and declarations of a conspirator in furtherance of the common aim to all his fellow conspirators, is applicable even though no conspiracy has been charged. *United States* v. *Bernard*, 287 F. 2d 715, 720–721 (C.A. 7th), certiorari denied, 366 U.S. 961; *Davis* v. *United States*, 12 F. 2d 253, 257 (C.A. 5th); *Reistroffer* v. *United States*, 258 F. 2d 379, 386–388 (C.A. 8th); *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2d); *Neal* v. *United States*, 185 F. 2d 441, 442 (C.A.D.C.), certiorari denied, 340 U.S. 937; *Lee Dip* v. *United States*, 92 F. 2d 802, 803 (C.A. 9th), certiorari denied, 303 U.S. 638; cf. *American Fur Co.* v. *United States*, 2 Pet. 358, 365–366.

the jury, argued that as soon as Sullivan learned from Busby that Lubben's books showed the cash payments to Shotwell, Sullivan "had his people go right straight to the Government then and there" and make a voluntary disclosure (R. 2195; cf. R. 1980); and (2) Sullivan joined with all the other defendants in *requesting* an instruction under which the jury might consider on the issue of intent "the actions of the defendants pursuant to the voluntary disclosure policy" (R. 3210).[*]

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[*] With respect to the point (Br. 108) that Lubben "voluntarily recant[ed] his testimony [regarding a conversation between Lubben and Sullivan] because of overnight 'divine guidance'", it should be noted that the only change in Lubben's testimony pertained to the date of the conversation (R. 920-922). Although petitioners did not object to Lubben's use of the phrase "divine guidance" at the trial, they have rarely missed an opportunity—during nine years of appellate proceedings—to ridicule him for it. The testimony, which was given on direct examination, appears in the following context (R. 922):

"Q. Well, have you arrived at this more refreshed recollection just through your own mental processes or have you had something that you have seen that helps to refresh your recollection?

"A. Sir, I have seen nothing but each day and each night I ask for divine guidance to remember as correctly as I can possibly can [*sic.*].

"This happened back in 1946 and I am trying very hard and I don't want to say anything that is not true. I am doing the very best I possibly can."

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Extracts From Published Pronouncements of Treasury Officials Relating to the Voluntary Disclosure Policy

In a press release issued by the Treasury Department, Bureau of Internal Revenue, on October 5, 1945, Commissioner of Internal Revenue Nunan (R. 3131–3132):

> * * * stressed the Bureau policy of refraining from instituting criminal proceedings against taxpayers who come forward voluntarily and pay up delinquencies plus interest and civil penalties before the Bureau has begun investigating their cases.

On May 14, 1947, the Chief Counsel of the Bureau of Internal Revenue, J. P. Wenchel, said in the course of an address delivered before the Tax Executives Institute in New York, entitled "Tax Frauds and Voluntary Disclosures" (R. 3132, 3135–3137):

> There is one important exception to [the Treasury's policy of recommending criminal prosecution in tax evasion cases]. The Department has broad discretionary power long recognized by the Congress to determine the policy and procedure for the effective enforcement of the internal-revenue laws. The Department, acting under that power, does not recommend prosecution of the evader who repents in time. There is nothing new in the position. For years the position of the Department has been that where the taxpayer makes a voluntary disclosure of intentional evasion before investigation has been initiated, criminal prosecution will not be recommended.

The Department has always encouraged voluntary disclosures.

And what is a voluntary disclosure? A voluntary disclosure occurs when a taxpayer of his own free will and accord, and before any investigation is initiated, discloses fraud upon the Government.

* * * * *

In excusing the man from criminal prosecution, we are merely taking a sensible step to produce the revenue called for by law with the minimum cost of investigation. The man who makes a voluntary disclosure saves us a lot of money in investigating. In return, we can spare him a term in jail. This is good business from his standpoint and it is good business from the Government's standpoint.

In a press release issued on May 25, 1947, Secretary of the Treasury Snyder stated (R. 3140–3141):

One of the important elements in settling cases, with civil penalties and without prosecution, has been the Treasury's policy of not prosecuting persons who make a voluntary disclosure of their fraud before the Treasury begins an investigation of their cases. This means that, in order to assure himself against criminal prosecution, a repentant taxpayer must disclose his fraud to an official of the Bureau of Internal Revenue before the case has been assigned for examination and before an investigating officer of the Bureau has requested advice from appropriate officers of the Bureau regarding the case. Prior to such action within the Bureau, a taxpayer may make a voluntary disclosure and escape criminal prosecution even though his name may appear in an inactive file of suspects. This presumes, of course, that the repentant taxpayer cooperates with agents of the Bureau in determining the true tax liability.

The voluntary disclosure policy was revoked by a press release issued by the Treasury Department on January 10, 1952, in which Secretary of the Treasury Snyder stated (R. 3142):

> While it has been the long-established policy of the Treasury Department to refrain from recommending criminal prosecution where taxpayers make voluntary disclosure of intentional tax evasion prior to the initiation of an investigation by the Bureau of Internal Revenue it has been concluded that such policy will no longer be followed.

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